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ATTEMPTS TO MONOPOLIZE—SPECIFIC INTENT AS ANTITRUST'S GHOST IN THE MACHINE

Barry E. Hawk†

Increasing attention is being focused upon the antimonopoly provisions of section 2 of the Sherman Act¹ as an insufficiently used antitrust enforcement weapon.² While most of the literature is directed toward the completed offense of actual monopolization,³ the last fifteen years have also witnessed an accelerating resort by private plaintiffs to claims of attempt to monopolize in which the challenged conduct is unilateral, thus not subject to section 1 of the Sherman Act,⁴ and is engaged in by a firm not possessing the monopoly power necessary to sustain a claim of actual monopolization.⁵ This Article analyzes the courts' rationales in disposing of attempt claims and describes the case results in terms of certain recurring fact situations.⁶

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¹ 15 U.S.C. § 2 (1970).

² Section 2 prohibits actual monopolization, combinations, or conspiracies to monopolize and attempts to monopolize. The distinction between conspiracies to monopolize and concerted attempts is sometimes blurred in the decisions, particularly when broad instructions are given to the jury. *See, e.g.,* Mount Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969). The basis for the distinction is that the gravamen of the conspiracy offense is the agreement of the defendants to combine together, while an unlawful motive or purpose is emphasized as the gravamen of an attempt to monopolize. *See* United States v. Charles Pfizer & Co., 245 F. Supp. 737, 739 (E.D.N.Y. 1965). Conspiracy to monopolize covers a broader range of conduct because there is no dangerous probability test—whether a dangerous probability exists that actual monopolization will result from the defendant's conduct—and specific intent either is not required or is subject to a lesser standard. *See* United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961).

Attempts to monopolize may be either unilateral or concerted. Because most courts have treated concerted attempts in the same manner as unilateral attempts, the attempt offense will be examined as a single category.

³ For example, it has been argued that § 2 can be used to challenge oligopolies as "shared monopolies." *See* Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1226-31 (1969).

⁴ 15 U.S.C. § 1 (1970).

⁵ For example, termination of a distributorship by a manufacturer has been frequently alleged to constitute an attempt to monopolize the local distribution of the manufacturer's product. *See* note 184 and accompanying text *infra*.

⁶ Proposed formulations of the attempt to monopolize offense vary markedly. Most commentators prefer to propose changes in the law rather than to analyze existing case law. Some writers have approved Justice Holmes's classic definition in *Swift & Co. v.*

The attempt offense has been a highly unpredictable enforcement weapon because it is perhaps the least judicially defined offense under either the Sherman or Clayton Acts.⁷ Nor has it been a powerful enforcement weapon, for usually it has added very little to plaintiffs' recovery or relief.⁸ The vagaries of its formulation, however, permit the attempt claim to lurk quietly in the pleadings and instructions until seized upon by the jury as a basis for granting treble damages.

Although the classic elements of the attempt offense articulated in *Swift & Co. v. United States*⁹—"specific intent" to monopolize plus a "dangerous probability" that a monopoly will result from the defendant's conduct—are often recited in opinions, they mask a myriad of conflicting rationales.¹⁰ The vagaries arise primarily because attempt claims often reveal fundamental ambiguities in the economic and political goals and premises underlying the antitrust laws. Even assuming a general consensus on economic goals and theories, a consensus which does not exist, the basic and exceedingly difficult task of determining

United States, 196 U.S. 375 (1905): "specific intent" plus "dangerous probability." See Hibner, *Attempts To Monopolize: A Concept in Search of Analysis*, 34 ANTITRUST L.J. 165, 173-77 (1967); Smith, *Attempt To Monopolize: Its Elements and Their Definition*, 27 GEO. WASH. L. REV. 227, 230-31 (1958). Others have proposed a stricter standard covering a broader range of practices. See P. AREEDA, ANTITRUST ANALYSIS 177-78 (1967) (specific intent and market power may be alternative requirements which vary in inverse proportion to offensiveness of conduct); Blecher, *Attempts To Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market,"* 38 GEO. WASH. L. REV. 222 (1969) ("exclusionary" intent to preclude plaintiff's access to portion of industry's business; no dangerous probability requirement); Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 303-08, 313-15 (1956) (specific intent, established by coercive conduct or absence of normal business purpose); Note, *Prosecutions for Attempts To Monopolize: The Relevance of the Relevant Market*, 42 N.Y.U.L. REV. 110, 119 (1967) (specific intent alone; neither dangerous probability nor relevant market requirement); Note, *Attempt To Monopolize: The Offense Redefined*, 1969 UTAH L. REV. 704, 715-17 (conduct that has had, or if unchecked will have, effect of setting another's price or excluding competitor without legitimate business purpose, plus coercive use of economic power).

⁷ 15 U.S.C. §§ 1-27 (1970).

⁸ See notes 184-86 *infra*.

⁹ 196 U.S. 375, 396 (1905).

¹⁰ Some courts, when confronted with an attempt claim, limit themselves to a mere recital of the *Swift* formulation; others simply dismiss the attempt claim without any reference to either a test or precedent. See, e.g., *Bernard Food Indus., Inc. v. Dietene Co.*, 415 F.2d 1279 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963), *cert. denied*, 385 U.S. 976 (1966). Moreover, there are inconsistencies in definition and emphasis. Compare *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961), with *Southern Blowpipe & Roofing Co. v. Chattanooga Gas. Co.*, 360 F.2d 79 (6th Cir. 1966), *cert. denied*, 393 U.S. 844 (1967).

when business practices are anticompetitive remains.¹¹ Moreover, there is an increasing feeling among some economists that neither classical nor neo-classical economic theory presently provides clear, precise criteria upon which to evaluate anticompetitive impact.¹² Furthermore, political policies, such as deconcentration of economic power¹³ and

¹¹ See Bernhard, *Divergent Concepts of Competition in Antitrust Cases*, 15 ANTI-TRUST BULL. 43, 50-51 (1970). See also *United States v. Corn Prods. Ref. Co.*, 234 F. 964, 1011-15 (S.D.N.Y. 1916) (Judge Learned Hand's distinction between "hard" and "soft" competition).

The problem is due in part to the fact that successful competition necessarily results in harm to competitors. See *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796, 780 (S.D. Cal. 1952), *aff'd*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956). The evaluation of anticompetitive conduct on the basis of economic criteria alone is complicated by long-term and short-term economic considerations and by the fundamental question of whether competition should be defined primarily from the perspective of competitors or consumers. Professors Blake and Jones, in discussing business motivation, appear to condemn business practices "that do nothing to improve resource utilization or efficiency or to increase consumer satisfaction in relation to the price paid." Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 385 (1965) [hereinafter cited as Blake & Jones]. Even economists such as Schumpeter, who view capitalism (and competition) as a process of creative destruction, concede that some business practices may be injurious to long-term economic development. See, e.g., J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 91 (3d ed. 1950). The often asserted single standard of "efficiency" or "efficient allocation of scarce resources" is rarely a sufficient and workable standard whether or not economics is the sole relevant factor. Compare Blake & Jones 385, with Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 370 (1965). There is certainly no simple and unqualified relationship between antitrust policy and economic efficiency. See Blake & Jones 394-98. For a discussion of a proposed role for economic analysis in antitrust enforcement, see P. ASCH, *ECONOMIC THEORY AND THE ANTITRUST DILEMMA* 102-30, 223-27 (1970).

¹² See, e.g., R. HEILBRONER, *BETWEEN CAPITALISM AND SOCIALISM* 165-92 (1970). Classical economics itself contains a basic paradox in its approach to competition in that unregulated market conduct (total laissez-faire) would lead not to perfect competition but rather would provide "an opportunity for the stronger to liquidate the weaker or reduce them to a subordinate position." C. FURTADO, *DEVELOPMENT AND UNDERDEVELOPMENT* 98 (1964).

¹³ Although these political goals may be deplored or dismissed as mere rhetoric (see, e.g., Bork & Bowman, *supra* note 11, at 369-70), their existence has undoubtedly influenced judicial resolution of major antitrust issues. For example, in *United States v. Aluminum Co. of America*, 148 F.2d 416, 427-29 (2d Cir. 1945), Judge Learned Hand stated:

It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. . . .

. . . .

. . . Throughout the history of [the antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.

This political goal was also enunciated by Justice Douglas, dissenting in *United States v. Columbia Steel Co.*, 334 U.S. 495, 536 (1948):

protection of each trader's opportunity to do business,¹⁴ underlie the antitrust laws. These political goals may in some cases be inconsistent with the purely economic criteria applied in a particular case. Dispositions of attempt claims also reveal that courts are relying upon a third policy consideration. This consideration is an ethical evaluation of business conduct in light of an inarticulated and undefined code of business ethics or a fairness standard, employing conclusory evaluative terms such as "unfair," "legitimate business purpose," "predatory," and "exclusionary."¹⁵

The ultimate issue must be resolved by identifying and reconciling these various criteria and policies. The aim of this Article, however, is more modest. The Article will demonstrate that the specific intent requirement is an improper vehicle for the resolution of the fundamental policy decisions involved. It is the thesis of this Article that the essential characteristic of the offense of attempted monopolization is an evaluation of the defendant's conduct in light of the market structure and that this evaluation more often than not rests upon inarticulated and perhaps purely personal judicial views of business ethics as well as upon imprecise economic and political considerations. The specific intent requirement impedes this conduct evaluation by connoting a subjective intention to monopolize existing in the mind of the actor. As will be seen, specific intent to monopolize has been inferred only from conduct which was previously determined to be undesirable.¹⁶ Thus, specific intent to monopolize, despite its con-

Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men.

¹⁴ Professors Blake and Jones articulate these political goals as minimizing political interference with self-policing markets and protecting and enlarging individual freedom and opportunity. See Blake & Jones 382-84; Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 422-36 (1965).

¹⁵ See *Times-Picayune Publ. Co. v. United States*, 345 U.S. 594, 597 (1953) ("predominantly motivated by legitimate business aims" and "bold, relentless and predatory commercial behavior"); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), cert. denied, 395 U.S. 961 (1969). This ethical code may overlap or parallel one's attitude toward "hard" and "soft" competition. Ethical criteria rest on the premise that competition is a game in which there are certain rules and whose object is not to win at all costs.

Lawyers and economists often resolve differently questions of the anticompetitive effects of certain practices. As pointed out by Professor Dewey, lawyers often condemn as immoral or unethical practices which an economist might sanction, at least on economic grounds. For example, an economist might argue that commercial bribery promotes efficiency and competition by exacerbating suspicion among businessmen and by speeding dissemination of information. See D. DEWEY, *THE THEORY OF IMPERFECT COMPETITION: A RADICAL RECONSTRUCTION* 122-23 (1969).

¹⁶ See notes 230-31 and accompanying text *infra*.

notation of a state of mind of the actor, is invariably based upon an evaluation of conduct.

An unnerving number of opinions concerning attempts to monopolize fail to articulate the criteria which have been utilized in evaluating the defendant's conduct; one often gets the uncomfortable feeling that intuition alone is at work. The specific intent requirement which masks the inarticulated and intuitive bases for decisions should be eliminated and replaced by a formulation which focuses the attention of courts and juries upon their proper task of conduct evaluation.¹⁷

I

CLAIMS OF ATTEMPT TO MONOPOLIZE IN THE SUPREME COURT

Few Supreme Court opinions have been addressed to the attempt offense.¹⁸ In 1905, Justice Holmes, in *Swift*, enunciated what has become the classic formulation:

Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.¹⁹

The precedential value of the *Swift* formulation is subject to a

¹⁷ See notes 226-32 and accompanying text *infra*.

¹⁸ Two points should be kept in mind when examining these decisions: (1) the extent of the Court's adherence to the *Swift* formulation, and (2) a comparison of the Court's approach to attempt claims with the approaches taken by lower courts, particularly with respect to specific intent.

¹⁹ 196 U.S. 375, 396 (1905). At least one court has interpreted this language to require specific intent only, reasoning that it is the fact of specific intent which brings about the dangerous probability. See *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). This broad reading was arguably rejected by Justice Holmes in the *Swift* opinion:

Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. The same distinction is recognized in cases like the present.

196 U.S. at 402 (citation omitted). *But see* note 21 *infra*. The "specific intent" plus "dangerous probability" formulation is a restatement of the test for criminal attempt enunciated by Holmes in *Commonwealth v. Peaslee*, 177 Mass. 267, 272, 59 N.E. 55, 56 (1901). The rationale underlying this definition of criminal attempt is that an individual may be punished only when his actions, in light of his intent, create a danger of harm to society; this danger arises only when the individual comes very close to consummating the crime. *Id.* at 271-72, 59 N.E. at 56; see Note, *supra* note 6, 1969 UTAH L. REV. at 709-11 (criticizing narrow penal interpretation of attempt provision of § 2 as failing to implement broad social and economic goals of Sherman Act).

number of contextual limitations. First, the decision provides little instruction beyond a mere verbalization of the test. The conduct in *Swift* was so clearly unlawful under section 1 of the Sherman Act that it would satisfy any of the later judicial formulations of the specific intent requirement.²⁰ Moreover, no analysis of the dangerous probability aspect was provided, even though the defendants held sixty percent of the market.²¹ Second, the unlawful attempt finding may not have been strictly necessary to obtain the result. The conduct and market power of the defendants approached the actual monopolization also charged in the indictment.²² Third, Justice Holmes's formulation was developed in response to the defendants' objection to the bill as multifarious. Justice Holmes dismissed the objection on the ground that the scheme as a whole seemed to be within the reach of the law and that the unity of the plan embraced all the parts.²³ Thus, there was a shift in the opinion from the two-fold classical formulation to the broader concept of a "scheme" or "plan" which brought together all the separate acts charged in the indictment.

Since *Swift* only a handful of decisions offer guidance in determining the Supreme Court's characterization of the attempt offense.²⁴

²⁰ Most of the defendants' practices would be considered per se restraints today: for example, price-fixing, manipulation of buying prices, bid rigging, output restrictions, black-listing, and inducement of unlawful rail rebates. All of these practices were alleged in *Swift*. See 196 U.S. at 390-93.

²¹ *Swift* does not necessarily compel a dangerous probability requirement despite Holmes's clarifying statement that intent alone is insufficient and that a "question of proximity and degree" is involved. *Id.* at 402; see note 19 *supra*. This clarifying language was directed primarily toward the scope of the injunctive decree and not toward the definition of an attempt to monopolize. Holmes was examining whether the "lawful" conduct or combinations (rebates) could be enjoined apart from the general common scheme. 196 U.S. at 402. He concluded that such conduct, lawful by itself, may be enjoined when it is an important part of the common scheme. *Id.*

²² The defendant's share of the market (60%) was substantial market power if not an actual monopoly under the percentage guidelines later developed by the courts in actual monopolization cases. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). Indeed, it is not clear whether the Court viewed the case primarily as a concerted attempt to monopolize or as a conspiracy to monopolize. The Court appears to have viewed the indictment as a charge of a single common conspiracy to monopolize. Although Holmes did make a distinction between attempt and conspiracy to monopolize, his reliance on the common plan or scheme rationale blurs that distinction. 196 U.S. at 395.

²³ 196 U.S. at 395-96.

²⁴ Attempts to monopolize were charged in *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), and *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). The opinions in both cases, however, were quite vague as to the distinction between concerted monopolization and attempts to monopolize. The importance of the *Standard Oil* decision is its statement that § 2 of the Sherman Act complements § 1 by prohibiting conduct which, although not violative of § 1, still constitutes an attempt to monopolize. 221 U.S. at 61.

These few decisions reveal two entirely different conceptions of the claim. One is represented by the classic *Swift* formulation. A second standard or conception has been applied in cases involving misuse of monopoly power held in one market to foreclose competition in a second, nonmonopoly market. This second formulation—misuse of monopoly power—was most explicitly developed in *United States v. Griffith*.²⁵ In *Griffith*, a group of motion picture exhibitors owned the only theatres in sixty-two percent of the geographic markets where they owned or had an interest in such theatres (“closed towns”). In the remaining towns in which they owned theatres they competed with other exhibitors (“open towns”). The Court held that circuit buying by the exhibitors violated sections 1 and 2 of the Sherman Act.²⁶ The Court reasoned that operating the sole theatre in a town or having

The Court further stated that an intent to monopolize is necessary for a violation of § 2 and that intent may be inferred from conduct. *Id.* at 75-77. But no distinction was made among the intent requirements of the different § 2 offenses.

Standard Oil and *American Tobacco* are excellent examples of decisions in which the attempt may be said to merge into the completed offense of actual monopolization. Another example of a case in which all § 2 offenses were alleged without separate discussion or treatment of the attempt claim is *Indiana Farmers' Guide Publ. Co. v. Prairie Farmer Publ. Co.*, 293 U.S. 268 (1934).

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), and *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), provided the first clear differentiations between the general intent necessary for actual monopolization and the specific intent necessary for attempts. General intent is a very liberal, and easily satisfied, standard; it will probably be inferred once a court finds the “plus” factors or the conduct which characterizes the monopolist. See *United States v. Aluminum Co. of America*, *supra* at 425. The specific intent to monopolize necessary for the attempt offense, on the other hand, is not a perfunctory requirement to be as readily inferred. Its actual scope was not defined in either *Alcoa* or *American Tobacco*. Indeed, the *American Tobacco* defendants were convicted on separate counts of violations of § 1—actual monopolization, conspiracy to monopolize, and attempt to monopolize—but were not sentenced on the attempt offense because it was considered merged into the completed offense. 328 U.S. at 783. Consequently, there was no appeal of the attempt conviction.

The offense of attempt to monopolize was also cited in *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1965), in which the Court held that intentional fraud on the Patent Office constituted either actual monopolization or an attempt to monopolize. No distinction was made between the two and the claim was characterized generally under § 2.

²⁵ 334 U.S. 100 (1948). Traces of this notion of misuse of monopoly power can, of course, be found in earlier decisions, particularly those involving vertically integrated industries. See, e.g., *United States v. Reading Co.*, 253 U.S. 26 (1920); *United States v. American Tobacco Co.*, 164 F. 700 (S.D.N.Y. 1908), *aff'd*, 221 U.S. 106 (1911).

²⁶ The contracts for both the “open” and “closed” towns were negotiated through joint agents and were combined into master agreements which had the following common features: (1) lumping together towns with and without competition, (2) computing the minimum rental on a circuit-wide rather than a film-by-film basis, and (3) providing that films could be played out of the order of their release rather than at a specific time in a specified theatre. 334 U.S. at 102-03.

the exclusive right to exhibit a film constituted monopoly power, and the use of such power to (1) "foreclose competition," (2) "gain a competitive advantage," or (3) "destroy a competitor" was unlawful.²⁷ More precisely, the Court prohibited the use of a strategic position, the monopoly in one geographic area, to acquire exclusive privileges in a second geographic area in which there are competitors.²⁸

Griffith is important because it serves as a cornerstone supporting a large body of precedent condemning, as violative of section 2, misuse of monopoly power in one market to secure a competitive advantage in a second market.²⁹ Despite the *Griffith* Court's emphasis on actual monopolization, some lower courts have cited *Griffith* in condemning, as an unlawful attempt, the use of monopoly power in one market to obtain a competitive advantage in a second market.³⁰

This interpretation was recently reinforced in *Otter Tail Power Co. v. United States*,³¹ in which the Supreme Court relied on *Griffith* in affirming a lower court finding that a private electrical utility had attempted to monopolize by using its dominant position in the wholesale market of subtransmission to foreclose the entry of municipalities into the retail market.³² The Court reasoned that Otter Tail misused its almost complete monopoly of the subtransmission market³³ by refusing to sell at wholesale or to "wheel" electric power to the municipalities within its overall service area.³⁴

²⁷ *Id.* at 107.

²⁸ The Court found that the defendant had used its one-market monopolies as a trade weapon against its competitors with the result that it had "expanded its empire" and had used monopoly power to "begat monopoly." *Id.* at 100.

²⁹ See, e.g., *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*, 360 F.2d 79 (6th Cir. 1966), *cert. denied*, 393 U.S. 844 (1968); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958); *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 1972 Trade Cas. ¶ 73,813 (S.D. Tex. 1971).

³⁰ See notes 161-69 and accompanying text *infra*. This is partially explained by the ambiguity of the *Griffith* opinion and by the fact that the Court reaffirmed the requirement of specific intent in attempt cases. See 334 U.S. at 105-06.

³¹ 93 S. Ct. 1022 (1973), *aff'g in part, vacating and remanding* 331 F. Supp. 54 (D. Minn. 1971).

³² 93 S. Ct. at 1029. The district court also found actual monopolization based on the same conduct. The Supreme Court also cited *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), and *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), for the proposition that the "use of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of § 2 of the Sherman Act." *Id.* at 1029.

³³ The Court characterized Otter Tail's position as "dominant." 93 S. Ct. at 1026 n.3. Although Otter Tail did not have a total monopoly in the subtransmission market, the Court found that the few rural cooperatives with available generation and subtransmission services did not "cut significantly into Otter Tail's dominant position in subtransmission." *Id.* Otter Tail was also found to have 91% of the various retail natural monopolies existing in the towns within its overall service area. *Id.* at 1026.

³⁴ *Id.* at 1029-30. The district court also found that Otter Tail had initiated litiga-

Because it invokes *Griffith* without reference to *Swift, Otter Tail* lends valuable support to the proposition that two-market situations should be subject to a standard different from the more familiar test governing actual monopolization and attempts to monopolize.³⁵

Meaningful application of the traditional *Swift* test in Supreme Court cases is limited to three decisions rendered between 1948 and 1953. In the first of these cases, *United States v. Columbia Steel Co.*,³⁶ the Court held that the defendant steel manufacturer's vertical and horizontal acquisition of a steel manufacturer-fabricator, following a successful bid to acquire a government-owned steel mill, was neither a restraint of trade under section 1 of the Sherman Act nor a concerted attempt to monopolize the fabricated steel products market.³⁷ The Court failed even to mention the *Swift* formulation, merely stating that the requirement of specific intent to monopolize was not satisfied.³⁸

The Court examined the vertical acquisition in light of the defendant's long history of prior acquisitions (180 before 1920 and eighteen between 1924 and 1943) and focused upon the defendant's business reasons for undertaking the most recent acquisition.³⁹ Specific intent was examined in terms of the absence or presence of a "normal business purpose."⁴⁰ The vertical acquisition of the fabricator was viewed by the Court as a necessary part of a judicially approved expansion of the eastern-located defendant into the western manufacturing market.⁴¹ The Court reasoned that it was a normal business purpose for a manufacturer entering a new geographic market to protect itself

tion for the purpose of delaying and preventing the establishment of municipal electric systems. By rendering the municipal bonds to finance such systems unmarketable, *Otter Tail* hoped to preserve its dominant position in the sale and transmission of electric power in the area. See 331 F. Supp. at 61-62. The Court remanded this issue. 93 S. Ct. at 1031.

³⁵ See notes 161-69 and accompanying text *infra*.

³⁶ 334 U.S. 495 (1948).

³⁷ *Id.* at 507-08.

³⁸ *Id.* at 520-27. A dangerous probability requirement was not enunciated, although this was not necessary to the decision. The Court did note a decline in the defendant's market shares (*id.* at 533) which indicates, if only impliedly, that the Court recognized the continuing existence of the requirement.

³⁹ *Id.* at 532-33.

⁴⁰ *Id.* at 533.

⁴¹ Prior to its most recent acquisition, the defendant, an eastern steel manufacturer, had acquired Geneva, a western steel manufacturer established and operated by the Government during World War II. The Geneva acquisition, which brought the defendant into the western manufacturing market for the first time, was hailed by the Court as part of "the welcome westward extension" of eastern steel manufacturers. *Id.* The Court then found that the "acquisition of a firm outlet to absorb a portion of Geneva's rolled steel production seems to reflect a normal business purpose rather than a scheme to circumvent the law." *Id.*

by acquiring a fabricating outlet in the new market.⁴² The Court also relied on evidence that competing eastern manufacturers bidding on the manufacturing plant had contemplated the acquisition of a fabricator in the event their bid was successful.⁴³

Two conclusions can be drawn from *Columbia Steel*. First, the Court did not view specific intent as a subjective state of mind of the defendant to be inferred merely from its conduct. The intent was determined from a direct evaluation of the defendant's conduct considered in the light of anticipated conduct of similarly situated competitors in the industry. The emphasis was not so much on intent or purpose as it was on normalcy—what is to be expected in a particular industry. To this extent the Court in *Columbia Steel* moved toward a totally objective standard based solely upon the actual trade practices in an industry. Further, the attempt claim was treated as a mere tag-along to the section 1 claim. Both claims were resolved similarly for the same reason—western expansion by the major steel manufacturers was economically desirable because it brought new competitive vigor to the western market.⁴⁴

The second case, *Lorain Journal Co. v. United States*,⁴⁵ is the only Supreme Court case in which an attempt to monopolize was the sole offense alleged. The Court held that a newspaper's refusal to accept advertisements from parties who also advertised on a newly established local radio station was both an attempt to monopolize and an attempt to regain a monopoly in the local dissemination of news and advertising.⁴⁶ In finding specific intent, the Court merely repeated the district court's finding that the purpose of the boycott was the complete elimination of the radio station as a competitor for local advertising.⁴⁷ The Court also repeated the district court's characterization of the defendant's conduct as "bold, relentless, and predatory."⁴⁸

⁴² *Id.*

⁴³ *Id.* at 503.

⁴⁴ *Id.* at 533-34. This interpretation of *Columbia Steel* is supported by Justice Douglas's dissenting opinion which condemned the acquisition and the westward expansion as undesirable regardless of whether it was motivated by normal business purposes. *Id.* at 537.

⁴⁵ 342 U.S. 143 (1951).

⁴⁶ *Id.* at 149-55. The distinction between these two attempts is not clearly delineated in the opinion. The boycott was extremely effective because the defendant had the only newspaper in Lorain and it reached 99% of the families in the town. Advertising in defendant's daily was thus essential to local businessmen for the promotion of their sales. *Id.* at 148. The radio station WEOL relied almost entirely on advertising for its income. *Id.*

⁴⁷ *Id.* at 149-50.

⁴⁸ *Id.* at 149.

Dangerous probability was considered only in rejecting the defendant's contention that a competitor must actually be eliminated before an attempt can be established.⁴⁹

Lorain's precedential strength as an attempt decision is weakened by the defendant's total monopoly position in the newspaper field and its unquantified but substantial power in the broader market of local news dissemination. Indeed, *Lorain* is similar to *Griffith* since the defendant used monopoly leverage power in one market (a product market—daily newspapers) to exclude competition in a second market (local news dissemination and advertising market).⁵⁰ *Lorain* differs from *Griffith*, however, because in *Lorain* the two markets were neither clearly defined nor clearly separate; the Court appeared to view the newspaper monopoly market as part of a larger market comprising both local radio and local newspaper advertising.⁵¹

The rationale in *Lorain* may be ambiguous, but the result is hardly surprising. Presumably, the Lorain Journal Company had a greater share of this second market than Columbia Steel had of the western fabrication market. Thus, an even better case could be made against the newspaper's activities on both the specific intent and dangerous probability grounds. Specific intent could be inferred from the defendant's conduct under any of the lower court approaches, and dangerous probability was clearly established. Unfortunately, the opinion is not as detailed with respect to the attempt offense as one might wish.

*Times-Picayune Publishing Co. v. United States*⁵² is the third Supreme Court decision discussing attempts to monopolize. The lower court finding of an attempt was reversed on the ground that specific

⁴⁹ The Court impliedly found the dangerous probability requirement satisfied in determining that the radio station had already lost income, that loss of that income was a major threat to its existence, and that WEOL would be eliminated unless an injunction against the boycott was issued. *Id.* at 153. On these findings, the dangerous probability requirement was certainly satisfied, because continuation of the defendant's conduct would have eliminated its sole competitor, thus assuring the defendant of a total monopoly. However, elimination of a single competitor in a more fragmented industry would not necessarily bring about a dangerous probability of monopoly power.

⁵⁰ The Court quoted the *Griffith* misuse of monopoly power test. *Id.* at 154 n.7.

⁵¹ "[A] single newspaper, already enjoying a substantial monopoly in its area, violates the 'attempt to monopolize' clause of § 2 when it uses its monopoly to destroy threatened competition." *Id.* at 154 (footnote omitted). Determination of the daily newspaper's share of the larger market would have been extremely difficult, if not impossible; WEOL had just commenced operations and estimation of potential radio revenues would have been difficult. Perhaps for this reason the Court flirted with, if it did not actually rely on, the *Griffith* misuse rationale, even though such an approach assumes two separate geographic or product markets.

⁵² 345 U.S. 594 (1953).

intent was not established.⁵³ Dangerous probability was not mentioned.⁵⁴ Specific intent was defined as an intent "to destroy competition or build monopoly" and was said to be inferable from conduct which had no predominant business motivation.⁵⁵ Four aspects of the defendant's conduct were examined separately. The Court affirmed the district court's findings that three of these courses of conduct were predominantly motivated by legitimate business purposes.⁵⁶ The fourth activity, adoption of unit rates, was found by the district court to constitute an unlawful tying arrangement under section 1 of the Sherman Act as well as an unlawful attempt to monopolize under section 2.⁵⁷ The district court expressly found that the unit rates were instituted in order to, among other unlawful objectives, "substantially diminish the competitive vigor of the Item."⁵⁸ The Supreme Court reversed this finding, holding that the unit rates were predominantly motivated by a legitimate business purpose.⁵⁹

The Court did not discuss legitimate purpose as a separate test under section 2. Instead, it equated specific intent under that section with one of the elements (business purpose) of the rule of reason approach under section 1—whether the purpose and effect of the conduct in question gives rise to an unlawful restraint of trade.⁶⁰ The

⁵³ *Id.* The defendant published the only morning newspaper and one of two evening newspapers in New Orleans. Each of the defendant's papers had approximately 40% of the total classified and general lineage in the area. The sole competitor had 20% of the remaining available lineage. Nevertheless, the Court, in a five-to-four decision, reversed the district court's civil injunction against use of unit rates for advertising in the defendant's papers. It found no per se unlawful tying arrangement, no unreasonable restraint of trade under § 1, and no attempt to monopolize. *Id.* at 613-15, 622-28.

⁵⁴ Since the defendant had approximately 80% of the market, the dangerous probability requirement was satisfied, at least to the extent monopoly power alone, as distinguished from monopolization, was the relevant consideration.

⁵⁵ 345 U.S. at 626.

⁵⁶ First, the defendant's acquisition of the evening newspaper in 1933 (which approximately doubled its market share to 80%) was held to be a legitimate means of business expansion and not an element of a calculated quest for monopoly control. Second, operation of the evening newspaper at a financial loss was not proved because costs and revenue allocations between the defendant's newspapers were deemed bookkeeping transactions without relevant economic or legal significance. Third, the defendant's interference with news vendors and other distributors was held to be merely part of an effort to seek equal treatment by vendors and not an interference with the competitor's business. *Id.* at 627.

⁵⁷ *Times-Picayune Publ. Co. v. United States*, 105 F. Supp. 670, 677-81 (E.D. La. 1952).

⁵⁸ *Id.* at 678.

⁵⁹ 345 U.S. at 627.

⁶⁰ *Id.* In examining the reasonableness of the unit rates under § 1, the Court adopted a purpose-effect approach, holding that the institution of unit rates was predominantly motivated by legitimate business purposes and that there were no anticompetitive effects resulting from the system. *Id.* at 621-24. Four factors were relied upon in establishing the

Court noted that conduct which is defensive in character and consistent with industry-wide practices tended to be based on a legitimate purpose even though standing alone it might have been illegal.⁶¹ The Court thus took a relatively permissive view of the competitive struggle, at least with respect to what constitutes unreasonable restraints and attempts to monopolize. The criteria used by the Court demonstrate an objective rather than a subjective approach to specific intent, with conduct viewed primarily in light of competitors' activities and industry-wide practices.⁶² The standard is objective in that the inquiry is an evaluation of the legitimacy of a defendant's conduct from the perspective of industry practices and structural conditions rather than from a determination of a defendant's state of mind.

The Court in *Times-Picayune* distinguished both *Lorain* and *Griffith*. The conduct in *Lorain* characterized as "bold, relentless, and predatory commercial behavior,"⁶³ was said to be not "remotely comparable" to the conduct in *Times-Picayune*.⁶⁴ Distinguishing the *Griffith*-type two-market cases proved more troublesome. First, the Court, citing *Griffith* and *Swift*, stated that a two-market situation can indeed give rise to an attempt violation.⁶⁵ Although the citation to *Swift* might

legitimate purpose under § 1 (and impliedly under § 2): (1) defensive adoption of unit rates to match a competitor's practice was particularly relevant when intent was ambiguous; (2) unit rates substantially reduced costs and rationalized complicated and multiple printing operations; (3) unit rates were not a novel restrictive scheme but an industry-wide practice; and (4) unit rates were considered by the newspaper industry as a competitive weapon against other media for national advertising accounts. *Id.* at 623-24.

⁶¹ *Id.* at 624-25.

⁶² The second factor mentioned by the Court in its approach to the § 1 claim—reduction of costs and rationalization of production—might appear to represent a subjective approach since it is used to disprove the contention that the subjective purpose of the conduct was to destroy a competitor or to build a monopoly. But the defendants could still have subjectively desired to attain monopoly power with production rationalization employed as a means toward that goal. The Court, however, made a judgment that cost reductions and rationalization were economically desirable and, therefore, legitimate. Similarly, conduct which promotes competition in a larger market was generally considered desirable and legitimate.

The Supreme Court on a number of occasions has refused to approve conduct which had demonstrable anticompetitive effects in one market, even though it was contended that the same conduct helped the defendant compete in a second market. *See, e.g.,* *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1965). *Times-Picayune* is not inconsistent with such decisions, because the Court there dealt only with "purpose" in a situation in which no anticompetitive effects were in fact found.

⁶³ 342 U.S. at 149.

⁶⁴ 345 U.S. at 627.

⁶⁵ The Court distinguished familiar attempt cases from the more peculiar *Griffith* two-market situation: "This case does not demonstrate an attempt by a monopolist established in one area to nose into a second market, so that past monopolistic success both

be best viewed as a genuflection to Justice Holmes, the citation to *Griffith*, subsequently repeated in *Otter Tail*,⁶⁶ is significant, for the Court reads *Griffith*'s two-market conduct as an attempt offense rather than a "misuse of monopoly power" offense under a different provision of section 2. A neater and less troublesome handling of the *Griffith* offense is to consider it a separate section 2 offense, focusing on the defendant's alleged use of leverage. Furthermore, the Court's two reasons for making the *Griffith* two-market situation an attempt offense are not convincing. It is questionable whether "past monopolistic success"⁶⁷ enhances the probability of future harmful conduct in a second market or "supplies a motivation for further forays."⁶⁸ While these contentions may not be wholly inaccurate, they are speculative, require more empirical proof, and are ill-concealed attempts to stretch the misuse of monopoly power situation to fit within the traditional attempt formula.

It is clear from these cases that the Supreme Court treats specific intent in terms of an evaluation of conduct. The Court in *Columbia Steel* and *Times-Picayune* adopted a legitimate business purpose test to negate specific intent. That the conduct be only *predominantly* motivated by a legitimate business purpose may be a *Times-Picayune* refinement. However, it is doubtful that this refinement is workable, for the assignment of weights and degrees to "purpose" is meaningless as long as specific intent is viewed in terms of business behavior.

Unfortunately, it is not clear which criteria are relevant to the conduct evaluation. The decisions have considered assorted economic justifications.⁶⁹ More significantly, the criteria have included consistency with a competitor's conduct, consistency with trade practices in the industry, and use of defensive tactics. These factors reveal a rather permissive stance toward alleged attempts, because practices which meet these criteria may lack any economic justification. Thus, the Supreme Court has been willing to tolerate a rougher and more free-wheeling competitive struggle than many lower courts, particularly those which have adopted a fairness standard.⁷⁰ This attitude is best

enhances the probability of future harm and supplies a motivation for further forays." *Id.* at 626 (citations omitted).

⁶⁶ *Otter Tail Power Co. v. United States*, 93 S. Ct. 1022, 1029 (1973).

⁶⁷ 345 U.S. at 626.

⁶⁸ *Id.*

⁶⁹ *E.g.*, cost reductions and production rationalization in *Times-Picayune* and vertical integration following geographic expansion in *Columbia Steel*.

⁷⁰ See Judge Wyzanski's opinion in *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

exemplified by the Court's refusal in *Times-Picayune* to find an attempt, despite the district court's finding that unit rates were implemented for the purpose of destroying a competitor.⁷¹

There are, unfortunately, too few Supreme Court decisions to conclude which particular business reasons or economic justifications are acceptable as negations of specific intent, or, more accurately, as factors which are likely to result in a favorable evaluation of conduct.

II

APPROACHES OF LOWER COURTS TO MONOPOLIZATION ATTEMPTS

An almost anarchic state exists in the lower courts with respect to the definition and rationale of the attempt to monopolize offense. The *Swift* formulation is the most frequently verbalized, yet it is found in less than half of the opinions.⁷² Although specific intent appears to be required by all courts, dangerous probability is ignored in over half the opinions.⁷³ No formulation, standard, or even general approach is stated or implied in nearly twenty percent of the cases,⁷⁴ indicating that many courts treat attempt claims as addenda to claims under section 1 of the Sherman Act or section 3 of the Clayton Act.⁷⁵

⁷¹ 345 U.S. at 601.

⁷² See, e.g., *Central Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 422 F.2d 504 (8th Cir. 1970); *Diamond Int'l Corp. v. Walterhoefer*, 289 F. Supp. 550 (D. Md. 1968).

⁷³ Only the Ninth Circuit has expressly rejected dangerous probability as a requirement. See, e.g., *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), cert. denied, 377 U.S. 993 (1964). However, it has recently indicated second thoughts about its position. See *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972). Decisions in other circuits may fail to mention dangerous probability because a finding of no specific intent renders the former immaterial. See, e.g., *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*, 360 F.2d 79 (6th Cir. 1966); *Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080 (D. Md. 1969); *Mount Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453 (W.D. Pa. 1968), aff'd per curiam, 417 F.2d 622 (3d Cir. 1969).

⁷⁴ E.g., *Bernard Food Indus., Inc. v. Dietene Co.*, 415 F.2d 1279 (7th Cir. 1969), cert. denied, 397 U.S. 912 (1970); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 333 (6th Cir. 1962), cert. denied, 372 U.S. 907 (1963); *B & B Oil & Chem. Corp. v. Franklin Oil Corp.*, 293 F. Supp. 1313 (E.D. Mich. 1968); *Otto Milk Co. v. United Dairy Farmers Coop. Ass'n*, 261 F. Supp. 381 (W.D. Pa. 1966), aff'd, 388 F.2d 789 (3d Cir. 1967).

⁷⁵ Different or more complex formulations are expressed in a small number of opinions. Some offer a second definition as an alternative to *Swift*. For example, the *Griffith* misuse of monopoly power rationale was employed in two decisions. See *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959); *GAF Corp. v. Circle Floor Co.*, 329 F. Supp. 823 (S.D.N.Y. 1971). Another alternative definition expressed was "completion of [conduct] charged would . . . make [the defendant] a monopoly." *Campbell Distrib. Co. v. Joseph Schlitz Brewing Co.*, 208 F. Supp. 523, 528 (D. Md. 1962).

Three district courts have offered three different definitions without mentioning the

A. *Specific Intent*

While all lower courts accept specific intent as an essential element of the attempt offense, its definition and treatment vary considerably, and no majority definition or approach can be gleaned from the decisions.⁷⁶ Some decisions contain no analysis of specific intent whatsoever.⁷⁷ Other opinions recite a factual description of the conduct involved followed simply by a finding, accompanied by little or no analysis, that specific intent can or cannot be inferred from such conduct.⁷⁸ In cases involving allegations of both attempt and monopolization, courts often fail to distinguish between the general intent element of actual monopolization and the specific intent requirement of attempt claims.⁷⁹

A few courts, however, have addressed themselves to specific intent

Swift formulation: (1) "significant . . . market power [plus] . . . conduct likely to achieve . . . a monopoly in a line of commerce" or "certain commercially unfair acts [done] with the specific intent of destroying or injuring plaintiff and eliminating competition" (*Sam S. Goldstein Indus. v. Botany Indus., Inc.*, 301 F. Supp. 728, 736 (S.D.N.Y. 1969)); (2) "a plan to reach out beyond [the instant] acquisition by additional mergers" or an intent "to use the acquisition itself to monopolize even though it did not in fact achieve its goal" (*Bender v. Hearst Corp.*, 152 F. Supp. 569, 578 (D. Conn. 1957)); and (3) attempt to exclude a competitor from the opportunity of doing business. *See United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945). None of these formulations materially differs from the more usual elements, although *Goldstein* can be interpreted as requiring specific intent or dangerous probability.

⁷⁶ Most of the courts addressing themselves to specific intent define it as intent to acquire monopoly power (*see, e.g., Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); *Clausen & Sons v. Theodore Hamm Brewing Co.*, 284 F. Supp. 148 (D. Minn. 1967), *rev'd*, 395 F.2d 388 (8th Cir. 1968); *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963)); intent to monopolize (*see, e.g., Mount Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966)); intent to *exclude* a particular competitor (*see, e.g., United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945)); or intent to *destroy* a particular competitor. *See, e.g., American Football League v. National Football League, supra*; *Scott Publ. Co. v. Columbia Basin Publ., Inc.*, 180 F. Supp. 754 (W.D. Wash. 1959), *aff'd*, 293 F.2d 15 (9th Cir. 1961). These various definitions have been used interchangeably and without affecting judicial approaches to specific intent or to attempts to monopolize in general.

⁷⁷ *See, e.g., Bernard Food Indus., Inc. v. Dietene Co.*, 415 F.2d 1279 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); *South End Oil Co. v. Texaco, Inc.*, 237 F. Supp. 650 (N.D. Ill. 1965); *cf. Mackey v. Sears, Roebuck & Co.*, 237 F.2d 869 (7th Cir. 1956), *cert. denied per stipulation*, 355 U.S. 865 (1957).

⁷⁸ *See, e.g., Evening News Publ. Co. v. Allied Newspaper Carriers*, 160 F. Supp. 568 (D.N.J. 1958), *aff'd*, 263 F.2d 715 (3d Cir.), *cert. denied*, 360 U.S. 929 (1959).

⁷⁹ *See, e.g., Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967); *Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080 (D. Md. 1969).

in greater detail. These opinions reveal varying approaches to specific intent: (1) the legitimate business purpose approach,⁸⁰ (2) the unfairness approach,⁸¹ and (3) the gestalt approach.⁸² Each approach involves the familiar evaluation of conduct. The variable is the extent to which this evaluation remains free of *subjective* intent, or conversely, the extent to which this evaluation can be limited to purely behavioral criteria. Despite the Supreme Court's almost exclusive reliance on behavioral criteria, the criteria employed by the lower courts are, unfortunately, not nearly so clear.

1. *Legitimate Business Purpose Approach*

The majority of courts which discuss specific intent speak in terms of conduct not having a legitimate business purpose. This formulation is consistent with the language in *Times-Picayune*.⁸³ The approach reveals, however, an inherent ambivalence. The word "purpose" connotes *subjective* intent—an intent to monopolize existing in the defendant's mind—while the term "legitimate" emphasizes *objective* factors—intent inferred from overt acts.

It can be safely concluded that a subjective intent to monopolize without some overt conduct does not constitute an unlawful attempt.⁸⁴ In the usual attempt case, overt conduct exists as a matter of record and the issue is the relevance and weight to be accorded a finding of subjective intent. Of course, direct evidence of subjective intent to monopolize or to eliminate a competitor is rarely present in the cases.⁸⁵ When such evidence does exist, the courts accord it little or no weight in their stated rationales;⁸⁶ rather, they hold that specific intent can

⁸⁰ See notes 83-109 and accompanying text *infra*.

⁸¹ See notes 110-30 and accompanying text *infra*.

⁸² See notes 131-33 and accompanying text *infra*.

⁸³ 345 U.S. at 627.

⁸⁴ See, e.g., *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969).

⁸⁵ Few decisions refer to direct evidence of an unlawful subjective intent. See, e.g., *Scott Publ. Co. v. Columbia Basin Publ., Inc.*, 293 F.2d 15 (9th Cir. 1961); *United States v. Singer Mfg. Co.*, 205 F. Supp. 394 (S.D.N.Y. 1962), *rev'd on other grounds*, 374 U.S. 174 (1963). In only two of these cases was a violation found. See *Rea v. Ford Motor Co.*, 326 F. Supp. 627 (W.D. Pa. 1972); *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945).

⁸⁶ Perhaps the most colorful example is found in *Scott Publ. Co. v. Columbia Basin Publ., Inc.*, 293 F.2d 15 (9th Cir. 1961), in which the defendant, owner and chief executive officer of one of two newspapers involved in a bitter competitive struggle in a small town, stated that he would buy out the plaintiff for five cents on the dollar and that he was driving the plaintiff "to the wall." *Id.* at 21. The court held that this was not evidence of specific intent because the defendant actually believed he would become the dominant paper by reason of his superior experience and because the second statement was only part

be inferred from conduct. Thus, evidence of business reasons for certain practices is admissible as indicative of purpose or motive.⁸⁷ This inference contains within it, however, an evaluation by the court of the legitimacy of those practices. The interplay between legitimacy and purpose leads to an almost Byzantine intricacy which is illustrated in the following decisions.

*Independent Iron Works, Inc. v. United States Steel Corp.*⁸⁸ is an example of a decision which excluded subjective intent from its analysis, although it properly considered the business reasons for the conduct in question. The Ninth Circuit held that the plaintiff had the burden of proving that the defendant's acts were "not 'predominantly motivated by legitimate business aims,' but instead were done in order to gain monopoly power."⁸⁹ The defendant was a vertically-integrated steel producer-fabricator who had "rationed" steel supplies to fabricators, including the plaintiff, on a nondiscriminatory basis. The court found that a sudden and unexpected steel shortage in 1955, a time of suddenly increased demand due to a housing boom, legitimized the defendant's business purpose even though the conduct gave the appearance of a supply squeeze by an integrated producer.⁹⁰

A more subjective ingredient was injected into the analysis in *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*⁹¹ There, the defendant, a gas utility with a total monopoly in the gas market, had allegedly sold gas appliances at or below cost. The court rejected an attempt claim, finding that the defendant's purpose was not to monopolize the gas appliance market but to multiply the uses of its gas and increase its sales in the primary gas market.⁹² This lawful

of a sales pitch to a union which was helping to finance the defendant. *Id.* at 21-22. A more recent example is *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 19 (9th Cir. 1971), in which the court stated:

Dahl's attempt-to-monopolize claim rests entirely on its allegation that an employee of Cooper told an employee of Dahl that Cooper would drive Dahl out of business if Dahl chose to compete. Such a manifestation of intent to triumph in the competitive market, in the absence of evidence of unfair, anticompetitive or predatory conduct, is not enough to establish a violation of § 2.

⁸⁷ See, e.g., *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir. 1963).

⁸⁸ *Id.*

⁸⁹ *Id.* at 667, quoting *Times-Picayune Publ. Co. v. United States*, 345 U.S. 594, 626-27 (1953).

⁹⁰ 322 F.2d at 667-68. The circuit court strictly applied this approach by affirming a directed verdict for the defendants. At the same time the court did not view the business purpose approach as the exclusive standard. It noted that the plaintiff made "no complaint that [defendant's] success was due to grossly unfair pricing or a resort to *unfair business practices*." *Id.* at 668 (emphasis added).

⁹¹ 360 F.2d 79 (6th Cir. 1966), cert. denied, 393 U.S. 844 (1968).

⁹² *Id.* at 80.

purpose was supported by evidence indicating that the defendant had encouraged others to sell gas appliances and had offered free servicing of all appliances, including those purchased from competing appliance manufacturers.⁹³

A certain ambiguity inheres in the courts' concept of purpose. In one sense purpose is used to denote a subjective state of mind. However, this state of mind is inferred from conduct and the suspicion arises that intent is a fiction found to exist only after evaluation of the conduct on other grounds. *Southern Blowpipe* illustrates how subjective intent distorts the primary focus of the inquiry. In a two-market case such as *Southern Blowpipe*, the defendant's asserted leverage power, which is said to give rise to anticompetitive effects, is the primary and overriding issue and should not be obfuscated by considerations of the defendant's subjective intention to acquire monopoly power in the subsidiary market.

Many opinions indicate that judgments are made on the basis of imprecise notions of what practices and conduct should be prohibited. Specific intent and legitimate business purpose provide convenient vehicles to disguise this imprecision even though a detailed examination of each aspect of the conduct may be set forth by the court. *United States v. Jerrold Electronics Corp.*⁹⁴ illustrates the complexity and occasional inconsistency in the application of the legitimate business purpose test. The court vacillated between a purely subjective approach and a legitimate business purpose approach in examining several of the defendants' practices and acts.⁹⁵

First, tying arrangements made during the initial stage of the defendants' business were held not to constitute an unlawful attempt for the same reason that the arrangements were held not to constitute unreasonable restraints of trade—namely, that the tying contracts were necessary to enable the defendants to do business in a new and uncertain industry involving substantial investment risks.⁹⁶ The court also

⁹³ *Id.*

⁹⁴ 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

⁹⁵ In *Jerrold*, the government alleged tying arrangements (unlawful under § 1 of the Sherman Act and § 3 of the Clayton Act), vertical acquisitions (unlawful under § 7 of the Clayton Act), conspiracy to monopolize, and attempt to monopolize. The defendants were a CATV manufacturer in the decade following World War II, a period when cable television was then a new industry involving a high investment risk. By mid-1954, the defendants had gained 75% of the CATV market and were earning a substantial return on their investment. 187 F. Supp. at 555. The court, in a nonjury trial, found an unlawful attempt only in the narrow conduct area of certain threats made by one of the defendants' salesmen. *Id.* at 568-69.

⁹⁶ *Id.* at 567.

appears, however, to have adopted a more subjective intent approach. Noting that the defendants were initially faced by such "formidable competitors" as RCA and Philco, the court concluded that not even the most ambitious businessman would enter such a market with a policy or intent to drive out competitors.⁹⁷ This subjective approach is more pronounced in the court's examination of tie-ins continuing after the defendants were established. The court found that although these tie-ins were no longer justified and were therefore unreasonable restraints of trade, this did not render the tie-ins unlawful attempts to monopolize since the section 1 violations did not mean "that the defendants were not acting *in good faith* in maintaining [the tie-ins] as long as they did."⁹⁸ Good faith is a conclusory term which does not adequately articulate the court's rationale for holding that the tie-ins did not constitute an attempt at a time when they were no longer economically justified.

The second practice examined by the court was a discriminatory licensing scheme which never became operational. In connection with that scheme, the defendant corporation's president threatened a customer with patent litigation if purchases were made from a competitor. The court characterized the threat as "improper" and "ill-considered," but refused to infer specific intent to monopolize.⁹⁹ Since there was no legitimate business purpose or economic justification for the threats, a subjective approach appears to have dictated the result.¹⁰⁰ The court reasoned that the president had made the threat because he was "piqued" at the customer and felt that he had been discourteously treated and had been given insufficient consideration for his products. This pique did not excuse the threat "but [did] explain away any inference of monopolistic intent."¹⁰¹

Third, specific intent was inferred from the conduct of the salesmen of one of the defendants who had threatened to install competing cable television systems if the operator refused to buy the defendants' equipment. The court held that this threat constituted "most improper conduct," the natural effect of which "would be to create a monopoly [for the defendants] in the Northwest."¹⁰² This approach is certainly not purely subjective; the threat would probably constitute specific

⁹⁷ *Id.* at 567-68.

⁹⁸ *Id.* at 568 (emphasis added).

⁹⁹ *Id.* at 570.

¹⁰⁰ *See id.* at 570-71.

¹⁰¹ *Id.* However, the court further noted that this was only one and not a series of threats (*id.*), detracting somewhat from the purely subjective approach previously taken.

¹⁰² *Id.* at 69.

intent under a legitimate business purpose approach although such an approach was not mentioned. Nevertheless, no alternative approach can be gleaned beyond the court's characterization of the conduct as "most improper," a standard which smacks of the unfairness approach.¹⁰³

The court in *Jerrold* adopted inconsistent approaches despite its citation of the legitimate business purpose standard. A subjective intent test was utilized in the claims of the later tie-ins and the threats of patent litigation. This subjective standard was applied to exonerate conduct which had neither economic justification nor was motivated by business reasons. The acquisitions and the salesmen's threats were discussed in terms of impropriety and unfairness. A subjective standard was not verbalized. Thus, the court's decision may rest on notions and criteria not articulated in the opinion.

The mushrooming of professional football in the early 1960's gave rise to a second example of the disparate applications of the legitimate business purpose test. In *American Football League v. National Football League*,¹⁰⁴ unethical business conduct was rejected as the appropriate standard; the court apparently viewed specific intent in terms of a subjective state of mind.¹⁰⁵ Closer examination, however, reveals the ingredients of the legitimate business purpose test. For example, the district court accepted as negating specific intent evidence that the NFL owners felt expansion was financially profitable and necessary to help the NFL compete effectively with the AFL.¹⁰⁶ But the court also relied on additional evidence which did not indicate asserted business purposes for the expansion.¹⁰⁷ In other words, some of the evidence used

¹⁰³ The defendants also made vertical acquisitions resulting in an increase of their market share from 1.5% to 10%. The Court held that it would not be "fair" to infer specific intent from this activity absent any proof of a sustained practice of arbitrary supply squeezes. Although the result is consistent with other challenges of vertical acquisitions as attempts to monopolize (see notes 173-219 and accompanying text *infra*), the articulation of the rationale is somewhat imprecise.

¹⁰⁴ 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). The AFL claimed that the NFL's announced expansion into Dallas, Houston, and Minnesota was intended to exclude the newer AFL from those natural monopoly markets and that the announcements constituted a restraint of trade, actual monopolization, conspiracy to monopolize, and a concerted attempt to monopolize. 205 F. Supp. at 63. The Fourth Circuit affirmed a verdict for the defendants reached following a nonjury trial.

¹⁰⁵ The district court indicated that an unlawful subjective intent to destroy the AFL must be the *predominant* motive behind the expansion. 205 F. Supp. at 65. The court of appeals stated that a specific, subjective intent to gain an illegal degree of market control must be present. 323 F.2d at 132 n.18. The district court left open the question of the result when legal and illegal motives each had equal weight. 205 F. Supp. at 65 n.6.

¹⁰⁶ 205 F. Supp. at 78.

¹⁰⁷ The court considered evidence that offers and suggestions made by the NFL

to negate specific intent consisted of the business reasons for the expansion, while other conduct was analyzed in terms of motives rather than economic justifications¹⁰⁸

As these cases illustrate, inclusion of a subjective intent standard permits the introduction of a greater variety of evidence than is relevant to the legitimate business purposes of a defendant. The most important new category consists of evidence which, although not strictly relating to the business reasons underlying the questionable practices, nevertheless indicates a defendant's motive to monopolize or to destroy a competitor.¹⁰⁹ The additional evidence is typically used to negate specific intent, thereby permitting conduct which lacks legitimate business justification.

2. Unfairness Approach

A few courts have characterized specific intent in evaluative terms such as "unfair," "predatory," and "not honestly industrial."¹¹⁰ These terms imply the existence of a code of ethical conduct among competitors by which specific practices are evaluated to determine which conduct should be prohibited as an attempt to monopolize. Traces of this approach are visible in *Times-Picayune* where the Court distinguished *Lorain* on the ground that *Lorain* involved "bold, relentless and predatory" behavior.¹¹¹

Again, one receives the uncomfortable impression that terms such as "unfair" may not be the result of a coherent code of business ethics, but merely a verbal screen to mask the court's condemnation.¹¹² Only

owners were part of an effort by both leagues to find solutions to their mutual problems. *Id.* at 78-79.

¹⁰⁸ The circuit court, in holding that subjective specific intent was not established, relied on two kinds of evidence: (1) evidence that the NFL owners were already committed to expansion before the AFL was conceived and that they therefore had no intent to destroy the AFL; and (2) other evidence of "substantial business and economic reasons" for the expansion. 323 F.2d at 132.

¹⁰⁹ For example, the district court in *American Football League* refused to believe an unequivocal statement by one of the NFL owners that the purpose of the expansion was to destroy the AFL. See 205 F. Supp. at 78-79.

¹¹⁰ *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125, 140, 144 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961); see *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1342 (9th Cir. 1970) ("unfair tactics"); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 975 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969) ("unfair and predatory trade practices"); *Sam S. Goldstein Indus., Inc. v. Botany Indus., Inc.*, 301 F. Supp. 728, 736 (S.D.N.Y. 1969) ("commercially unfair acts").

¹¹¹ *Times-Picayune Publ. Co. v. United States*, 345 U.S. 594, 627 (1953).

¹¹² For example, in *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970), the defendant, a full-line integrated manufacturer, terminated the

one lower court decision, Judge Wyzanski's opinion in *Union Leader Corp. v. Newspapers of New England, Inc.*,¹¹³ has articulated the unfairness approach in a thoughtful fashion. Judge Wyzanski initially distinguished specific intent, defined as "intent to exclude competition," from the use of unfair means to implement that intent.¹¹⁴ He held, however, that the same conduct constituted evidence of both unfair means and specific intent:

[T]here is no sharp distinction between (a) the existence of an intent to exclude and (b) the use of unfair means. In a situation where it is inevitable that only one competitor can survive [natural monopoly], the evidence which shows the use, or contemplated use, of unfair means is the very same evidence which shows the existence of an exclusionary intent.¹¹⁵

Thus, the court attempted to avoid reliance on a subjective intent standard, and even implied that direct evidence of a subjective intent to destroy a competitor is irrelevant.¹¹⁶ To avoid the vagaries of subjective intent and legitimate business purpose, the court formulated

plaintiff's distributorship and began direct retail sales to former customers of the plaintiff. This entry into the plaintiff's market was allegedly followed by charging these customers lower prices and by the hiring of the plaintiff's top salesman who took additional customers with him to the defendant. The circuit court characterized the conduct as "unfair tactics" which constituted specific intent, but did not discuss the criteria and policy considerations underlying the determination or offer any explanation of the content of the ethical code. *Id.* at 1342.

¹¹³ 180 F. Supp. 125 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). The defendant published the *Gazette*, the only newspaper in Haverhill, Massachusetts. Following a labor dispute in 1957, its circulation dropped approximately 50%. Some Haverhill merchants then induced a New Hampshire publisher to begin a newspaper in Haverhill, the *Journal*. An intense rivalry ensued in what the court found to be a natural monopoly situation. Eventually, the *Gazette* sold out to a group of New England publishers after it refused an offer to buy from the *Journal*. Shortly after this sale, the publisher of the *Journal* brought an action for treble damages and injunctive relief alleging violations of § 1 of the Sherman Act, attempt to monopolize, and actual monopolization. The publisher of the *Gazette* counterclaimed for identical relief and on the same grounds. After a nonjury trial, the district court found both sides had violated § 1 and § 2. 180 F. Supp. at 145-47. The circuit court modified the decree, holding that only the plaintiff had attempted to monopolize and that the defendant *Gazette's* conduct was not unlawful. 284 F.2d at 589-90.

¹¹⁴ Judge Wyzanski described § 2 as prohibiting "a person . . . who has an intent to exclude competition . . . from using not merely technical restraints of trade, but even predatory practices . . . what may loosely be called unfair means." 180 F. Supp. at 140.

¹¹⁵ *Id.*

¹¹⁶ The court cited the *Restatement of Torts*, which states that a person is not subject to liability even though one of his intentions is the causing of harm to a competitor's business. RESTATEMENT OF TORTS § 709, comment c (Tent. Draft no. 17, 1938). As Judge Wyzanski aptly put it: "The law allows other joys in business life beside making money." 180 F. Supp. at 144.

what it hoped was a more objective standard¹¹⁷—violations of section 1 of the Sherman Act constitute evidence of specific intent. Only when this section 1 test fails to dispose adequately of the issue is the general unfairness approach employed as a supplement. Thus, per se violations of section 1 are conclusive evidence of intent.¹¹⁸ Unreasonable restraints of trade constitute rebuttable evidence of specific intent. Conduct found to be neither per se unlawful nor unreasonable under section 1 constitutes evidence of specific intent if such conduct can be characterized as “unfair.”

The court in *Union Leader* applied the unfairness rationale to varying types of practices and conduct. This application discloses that the approach has its own inconsistencies and ambiguities. An arrangement whereby the plaintiff paid large advertisers to solicit advertising without disclosing to solicitees that they were paid employees of the plaintiff was expressly condemned by the court. The arrangement was described as a “secret commission to an allegedly disinterested person for boosting the sale of a product.”¹¹⁹ Judge Wyzanski found the practice to be “misleading and immoral” and held it to be an “unfair practice” and “not honestly industrial.”¹²⁰ The emphasis here was obviously on an ethical code of conduct rather than on business justifications or economic criteria. A court with a more permissive attitude towards competition might view this arrangement more tolerantly.¹²¹

The judge's emphasis, however, shifted towards economic con-

117 This attempted simplification and clarification is consistent with Judge Wyzanski's general approach toward the actual monopolization provision. See, e.g., *United States v. Grinnel Corp.*, 236 F. Supp. 244, 247-48 (D.R.I. 1964), *aff'd in part*, 384 U.S. 563 (1966).

Judge Wyzanski also appears to have been influenced in *Union Leader* by his earlier approach to actual monopolization in *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), in which he emphasized criteria such as predatory practices, unfair methods of competition, and business patterns not “honestly industrial.” 110 F. Supp. at 341, 342. Indeed, he cites *Alcoa* and *United Shoe* in *Union Leader* and does not appear to make any significant distinction between his specific intent standard for attempts and the standard for actual monopolization. This apparent identity of standards may be explained by the fact that a natural monopoly situation existed, since the successful competitor will eventually acquire monopoly power and the actual monopolization standard would then apply.

118 For example, Judge Wyzanski found a concerted boycott when the plaintiff and the union representing the defendant's employees requested merchants to advertise solely in the plaintiff's newspaper. 180 F. Supp. at 140.

119 *Id.* at 141.

120 *Id.*

121 In *Scott Publ. Co. v. Columbia Basin Publ., Inc.*, 293 F.2d 15 (9th Cir. 1961), the court refused to find an attempt to monopolize in a competitive struggle between two small-town newspapers. While the particular acts and practices differ from those in *Union Leader*, the case is instructive because the tone of the opinion differs from the moralizing temper of *Union Leader*. Indeed, the circuit court in *Scott* dismissed *Union Leader* as precedent almost as an afterthought in a footnote. *Id.* at 22 n.17.

siderations when the plaintiff's secret discriminatory advertising rates were examined. Prima facie evidence of specific intent was said to arise when the defendant has substantial market power and no business justification exists, such as quantity discounts. Similarly, the plaintiff's attempt to buy out the defendant was not considered evidence of specific intent on the ground that the market was a natural monopoly and the purchase of a competitor at a reasonable price merely hastened the inevitable demise of continued competition.¹²² Finally, the unfairness approach was not relied on at all in examining the defendant's joint venture with the other New England publishers.¹²³

In sum, specific intent was initially discussed in terms of unfairness, but each particular practice was analyzed in a variety of ways. This demonstrates that some competitive conduct cannot be evaluated solely on the basis of unfairness and that economic factors must be openly and directly considered.

On appeal, the First Circuit generally adhered to this unfairness rationale with one important modification. The circuit court stated that an inference of wrongful intent could be rebutted by showing that the conduct was a defensive tactic necessary to avoid insolvency in the equity sense.¹²⁴

In calling this an "unfair practice" the [district] court assumed the point. For . . . the practice was "unfair" if conducted with an intent to monopolize, but it was fair if it was intended only to resist deterioration of its own position brought about by [the plaintiff's] unlawful activities.¹²⁵

Although the circuit court theoretically rejected Judge Wyzanski's apparent equation of unfairness with intent, its own intent test is no more substantive or objective than Judge Wyzanski's unfairness criterion. Nevertheless, the circuit court did hold that a party's conduct in response to a competitor's unlawful activity was an important factor in determining specific intent. This reasoning is arguably compelled by the statement in *Times-Picayune* that a competitor's unlawful practices are relevant factors in illuminating a defendant's "ambiguous" intent.¹²⁶ Since a defendant's intent is invariably, and perhaps inherently, ambiguous, such evidence is always relevant.

The conflict between the district and the circuit court is best

¹²² 180 F. Supp. at 142. This reasoning is criticized in Marcus, *Monopoly Profits, Economic Impossibility, and Unfairness as Anti-Trust Tests*, 14 VAND. L. REV. 581, 587-88 (1961).

¹²³ 180 F. Supp. at 143-45.

¹²⁴ 284 F.2d at 586-87.

¹²⁵ *Id.* at 586.

¹²⁶ 345 U.S. at 627.

described as a difference in attitude toward the competitive struggle. Judge Wyzanski envisioned the struggle governed by an undisclosed ethical code of business behavior which is based on moral as well as economic criteria. Judge Aldrich of the First Circuit adopted a more permissive attitude in which the combatants in the struggle have fewer restrictions on their conduct.

It should be noted that the unfairness approach could result in application of the attempt prohibition to conduct which also violates state statutory and common law rights, such as disparagement and tortious interference with contract.¹²⁷ Most courts have not adopted the unfairness approach, perhaps out of a fear that such an ethical standard would result in an unwarranted extension of the federal anti-trust laws.¹²⁸ Indeed, a few courts have expressly rejected the assertion that section 2 of the Sherman Act embodies an ethical business conduct code, arguing that specific intent is "neither rough competition nor unethical business conduct"¹²⁹ and that state tort laws, not federal antitrust laws, must be relied upon to enforce business morality.¹³⁰

3. *Gestalt Approach*

Under the gestalt approach, the practices from which specific intent is to be inferred are admitted into evidence and are submitted to the jury under very broad instructions defining specific intent as intent to acquire monopoly power or to destroy a competitor. The jury may

¹²⁷ The ethical approach is not necessarily more restrictive. Certainly a permissive business ethic could be posited. However, the courts which have approached the attempt problem in ethical terms seem more willing to condemn restrictive business conduct as an attempt to monopolize.

¹²⁸ In cases based upon state tort or contract law, a common response to attempt allegations is to treat them as superfluous. One excellent example is *M.E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13 (2d Cir. 1963), which involved a quarry-owner-fabricator's refusal to sell to a competing fabricator. Monopolization and attempt to monopolize were alleged. In reversing a preliminary injunction against the defendant, the circuit court stated: "Despite the conventional antitrust trappings with which the case has been draped, what we have here . . . is essentially a private squabble between two sets of energetic Yankee businessmen." *Id.* at 17.

¹²⁹ *American Football League v. National Football League*, 205 F. Supp. 60, 65 (D. Md. 1962). See also *Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080, (D. Md. 1969). In *Windsor Theatre Co. v. Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), the court stated: "Plaintiff's contention that [defendant's] aggressive competitive activities constituted monopoly or an attempt to monopolize . . . appears to be an effort to unduly magnify small and possibly unethical business competitive practices into a [Sherman Act] offense."

¹³⁰ See *B & B Oil & Chem. Co. v. Franklin Oil Corp.*, 293 F. Supp. 1313 (E.D. Mich. 1968). "Fair dealing" has also been criticized as a general antitrust policy on the ground that it is unenforceable. See C. KAYSER & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 56-58 (1959).

infer the requisite intent from all the practices viewed as a whole, without any discussion or examination of each individual practice or activity.¹³¹ This reliance on the jury is particularly dangerous in cases in which the charge on the attempt offense is buried among the instructions on actual monopolization and conspiracy to monopolize.¹³² The danger is aggravated when special interrogatories to the jury are not employed.

The principal defect of the gestalt approach is its frequent failure to provide adequate direction to the jury.¹³³ Not only is the finding of specific intent crucial to the decision, but it also obscures judgments which involve major policy considerations in critical and uncertain areas of antitrust law. The fact finder is not making a finding simply of the defendant's state of mind as in the ordinary criminal attempt situation, but is evaluating various business transactions. This evaluation is far too complicated and significant to be made by a jury with insufficient guidance, particularly when liberal admission rules permit a voluminous and often contradictory record.

Another drawback of the gestalt approach is its inadequacy as a tool for evaluating particular practices or aspects of a defendant's conduct. Certain practices may be desirable, some may be neutral, and others may be clearly unlawful under other sections of the antitrust

¹³¹ In *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967), the jury was instructed to examine the "whole picture," which consisted of the following practices of a fully-integrated orange grower-retailer: refusal to sell to the plaintiff-processor, prevention of other producers from selling to the plaintiff, price and supply squeezes, restrictive selling agreements, and misuse of consignment contracts and low bidding. See 369 F.2d at 459. See also *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir. 1957).

In a recent case, a district court instructed the jury in the following terms:

And I am leaving this all for you to consider as part of the whole picture because the Supreme Court has many times said that when you are faced with restraints of trade and attempts to monopolize trade, you can't necessarily break them down into separate compartments. You have got to view the picture as a whole. And so you consider all these matters and all the evidence in this case to determine whether in your own mind there was any violation of an attempt to violate the antitrust laws in the case.

Rea v. Ford Motor Co., 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 74,015, at 92,220 (W.D. Pa. 1972).

¹³² See *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1962) (jury instructions which combined monopolization, conspiracy to monopolize, and attempt to monopolize approved).

¹³³ A finding of specific intent, either by jury or judge, should not be subject to the "clearly erroneous" rule limiting appellate review of findings of fact because the finding is both an ultimate finding of fact and an ultimate legal issue. Thus, the Tenth Circuit has strongly condemned sending ultimate legal issues to the jury in antitrust cases. See *Smith v. Scriviner-Boogaart, Inc.*, 447 F.2d 1014, 1018 (10th Cir. 1971), *cert. denied*, 404 U.S. 1059 (1972).

laws. Distinctions among these types of practices may be helpful in classifying as unlawful a defendant's conduct as a whole. Thus, the gestalt approach makes it extraordinarily difficult, if not impossible, to predict the outcome of particular attempt claims or to advise clients concerning contemplated practices and conduct.

The gestalt approach is not necessarily limited to the jury. Cases in which the judge renders a finding of specific intent without any discussion or analysis are examples of a gestalt approach taken by the judiciary. This often occurs when the attempt allegations are treated as tag-along claims for relief. The judge, however, may be employing a different approach without defining it in his opinion. Speculation as to the reasons for an inarticulated rationale is hazardous. But certainly the absence of well-defined standards governing specific intent or attempts in general must provide strong motivation for an already overburdened judge to adopt a gestalt approach, particularly when counsel treat the attempt claim as a secondary issue.

The gestalt approach is acceptable as a means of evaluating acts and practices as a whole rather than each in isolation. It does not follow, however, that the jury should be instructed in terms of "specific intent" or a "common plan or scheme." These terms connote a state of mind which is irrelevant to the attempt to monopolize offense. Thus, to the extent that the underlying rationale of the gestalt approach—evaluation of conduct as a whole—can be applied without reference to specific intent or a common plan or scheme, it is valid and should be analyzed separately from specific intent doctrines.

4. *Conclusion*

The lower courts have sometimes adopted inconsistent approaches to specific intent, even when they have articulated the requirement in terms of legitimate business purpose. The major differences between the Supreme Court and lower court approaches has been the latter's occasional inclusion of a concept of subjective intent to monopolize or to destroy a competitor. This inclusion has had two undesirable results: (1) lack of a subjective intent has been used by some courts to allow conduct lacking apparent economic justification or business reasons, and (2) evidence has been admitted relevant to a finding of subjective intent which does not consist strictly of economic justifications or business reasons for the conduct and practices in question. To this extent, lower court determinations of specific intent have not been an evaluation of conduct limited entirely to behavioral, as con-

trusted with intentional, criteria. This is unfortunate because subjective intent to monopolize is not only irrelevant in this evaluation, but it also tends to obfuscate the criteria which the court ultimately uses to make the evaluation. Although Judge Wyzanski's unfairness approach differs in its quite proper rejection of subjective intent, it employs largely the same types of evidence as the legitimate business approach, and both share many of the same conceptual or linguistic difficulties. This is perhaps more the fault of the language employed than the judiciary, as can be seen from judicial attempts to refine further the evaluative terms invoked.¹³⁴ Judge Wyzanski's attempt to remedy this defect by placing specific intent on a clearer and firmer base of an ethical code must remain unsuccessful at least until that code can be articulated and defended.

Doubts about the sufficiency of the rational justification for many decisions involving alleged attempts to monopolize are not removed by referring the issue of conduct evaluation to the jury under the broad rubric of specific intent in terms of a subjective standard.¹³⁵ An impossible burden is thereby placed on the jury to attempt to resolve the problems of identifying, defining, and ordering the priority of the criteria which should underlie that evaluation.¹³⁶

¹³⁴ The Seventh Circuit has stated: "Because of its wrongful character and its potential for harm to the public, that conduct is appropriately characterized as 'predatory.'" *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 579, 599 (7th Cir. 1971). However, "wrongful" is no less ambiguous than "predatory."

¹³⁵ For example, in *Mount Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969), the subjective approach, or at least an emphasis on "purpose," was combined with purely economic criteria. At one point the court stated that "[a]n attempt is . . . a conative effort to achieve a result" and that "[t]he mental or volitional element is significant in the case of an attempt." *Id.* at 461. But in sending the question of attempt to the jury, the court enumerated specific economic criteria to be used in determining whether alleged predatory price cutting constituted an attempt. *Id.* at 459-62. *See also* *Peelers Co. v. Wendt*, 260 F. Supp. 193, 201 (W.D. Wash. 1966) (jury instructed that there must be preponderance of evidence that defendant "had actual knowledge that actions taken by him would tend to cause monopolization and that such person by such actions consciously desired to accomplish such monopolization").

¹³⁶ This explains why it is easier to criticize judicial formulations of specific intent than to articulate a clear, precise, and workable definition. For example, one commentator has criticized Judge Wyzanski's standards of "predatory" and "not honestly industrial" as bootstrap in nature since it is the intent which makes the conduct predatory. *See* Blecher, *supra* note 6, at 217-18. In this sense all the articulated standards or approaches are bootstrap, including the test proposed by Blecher: "a common-sense analysis of all of the facts and circumstances." *Id.* at 218. This formulation is more vague than any other approach except the gestalt approach and might, in fact, strike some observers as a mere verbalization of the gestalt approach.

B. *Dangerous Probability of Success*

The requirement that a defendant's conduct must give rise to a dangerous probability that actual monopolization will result before an attempt offense is established was first stated in *Swift*¹³⁷ and has been followed by the great majority of lower courts which have considered it.¹³⁸

As with definitions of specific intent, the verbal formulations of the dangerous probability requirement vary and do not appear to affect the decisions.¹³⁹ Perhaps the best expression of the courts' frustration in attempting to define the requirement is found in *Campbell Dis-*

¹³⁷ 196 U.S. at 396.

¹³⁸ In the lower courts there is virtual unanimity that the plaintiff has the burden of proving dangerous probability. *See, e.g.,* Central Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 422 F.2d 504 (8th Cir. 1970); *Alles Corp. v. Senco Prods., Inc.*, 329 F.2d 567 (6th Cir. 1964); *Mackey v. Sears, Roebuck & Co.*, 237 F.2d 869 (7th Cir. 1956), *cert. denied per stipulation*, 355 U.S. 865 (1957). Only the Ninth Circuit has rejected the requirement. *See* note 73 *supra*; note 147 *infra*. The Fifth Circuit recently reserved the question in *Woods Exploration & Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), although earlier decisions in that circuit required a showing of dangerous probability. *See, e.g.,* *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969); *Centanni v. T. Smith & Sons*, 216 F. Supp. 330 (E.D. La.), *aff'd per curiam*, 323 F.2d 363 (5th Cir. 1963).

Many opinions do not mention the dangerous probability requirement. In most of these cases, however, the requirement was not necessary because specific intent had not been proved. *See, e.g.,* *Daily Press, Inc. v. United Press Int'l*, 412 F.2d 126 (6th Cir.), *cert. denied*, 396 U.S. 990 (1969); *Bank of Utah v. Commercial Security Bank*, 369 F.2d 19 (10th Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967); *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*, 360 F.2d 79 (6th Cir. 1966), *cert. denied*, 393 U.S. 844 (1968). In some cases the defendant had already attained monopoly power in terms of market share percentage. *See, e.g.,* *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1962); *Denver Petrol Corp. v. Shell Oil Co.*, 306 F. Supp. 289 (D. Colo. 1969); *United States v. Singer Mfg. Co.*, 205 F. Supp. 394 (S.D.N.Y. 1962), *rev'd on other grounds*, 374 U.S. 174 (1963).

Union Carbide is an excellent example of the almost cavalier attitude toward dangerous probability in "mixed" cases when specific intent is present. The Tenth Circuit refused to reverse a jury verdict against the defendants when the instructions omitted the dangerous probability requirement. The circuit court held that the instructions were adequate even though the defendants' proposed instructions, which included the requirement, "may have been literally correct." 300 F.2d at 586.

Dangerous probability is not necessary in cases involving natural monopolies, because ultimately only one competitor will remain in the market. *See* *John Wright & Associates v. Ullrich*, 328 F.2d 474 (8th Cir. 1964). This explains the absence of the requirement in *Union Leader*.

¹³⁹ Some courts merely quote the *Swift* language (*see, e.g.,* *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 667 (9th Cir. 1963)); others speak of the "dangerous likelihood of success" that monopoly power will result from the conduct (*see, e.g.,* *Diamond Int'l Corp. v. Walterhoefer*, 289 F. Supp. 550, 574 (D. Md. 1968)) or that the defendant is "likely to accomplish" monopoly power. *See, e.g.,* *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969).

tributing Co. v. Joseph Schlitz Brewing Co.,¹⁴⁰ in which the court noted "the lack of authority" as to the "quantum of proof needed."¹⁴¹ Nevertheless, certain general elements of the requirement are recognized. A plaintiff must prove a relevant market and the defendant's share in that market.¹⁴²

The most facile method of determining dangerous probability is to focus upon a defendant's present market share compared with the potential share resulting from the allegedly unlawful conduct. This method has rarely been utilized by the courts and when it has, the decisions are too vague and inconsistent to make any meaningful generalizations about its acceptability or effectiveness.¹⁴³ On the other hand,

¹⁴⁰ 208 F. Supp. 523 (D. Md. 1962).

¹⁴¹ *Id.* at 529.

¹⁴² *See, e.g., Deltown Foods, Inc. v. Tropicana Prods., Inc.*, 219 F. Supp. 887 (S.D.N.Y. 1963). It is often stated that the market cannot be as narrowly defined as the defendant's own product. *See, e.g., Kemwel Automotive Corp. v. Ford Motor Co.*, 1966 Trade Cas. ¶ 71,882 (S.D.N.Y.).

¹⁴³ In one case, dangerous probability was held not to have been shown when the defendant could obtain at most 20% of the market as a result of the offensive conduct alleged. *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969); *see Advance Business Sys. & Supply Co. v. SCM Corp.*, 287 F. Supp. 143 (D. Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (3% to 4% held insufficient); *cf. Bendix Corp. v. Balax, Inc.*, 471 F.2d 149 (7th Cir. 1972) (31.2% held doubtful dangerous probability). One court found no dangerous probability when there was a decline in market share from 52% to 51% over the conduct period. *See Diamond Int'l Corp. v. Walterhoefer*, 289 F. Supp. 550 (D. Md. 1968). The district court in *Jerrold* held that a series of vertical acquisitions which resulted in an increase of the market share from 1.5% to 10% did not constitute an attempt, although the court stated that further acquisitions would violate § 7 of the Clayton Act. 187 F. Supp. at 566-67. A decline in market share from 68% to 32% was also noted in *N.W. Controls, Inc. v. Outboard Marine Corp.*, 333 F. Supp. 493 (D. Del. 1971), but this decline was apparently used by the court to find a lack of specific intent rather than to find an absence of dangerous probability. *Id.* at 517.

On the other hand, allegations that the defendant had 5% to 6% of the market was held sufficient to defeat summary judgment for the defendant. *See Campbell Distrib. Co. v. Joseph Schlitz Brewing Co.*, 208 F. Supp. 523, 528 (D. Md. 1962). In *Clausen & Sons v. Theodore Hamm Brewing Co.*, 284 F. Supp. 148 (D. Minn. 1967), *rev'd on other grounds*, 395 F.2d 388 (8th Cir. 1968), summary judgment for the defendant was denied where a 35% to 50% share was alleged. *But see McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959) (allegation of "dominant position" insufficient to state claim).

Exclusive reliance on market share percentage was condemned in *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969). The circuit court affirmed the dismissal of the complaint for lack of dangerous probability. The plaintiff had alleged that the defendant Kroger was the third largest competitor in a market characterized by "extremely competitive" conditions. *Id.* at 207. Although the court considered percentages used in prior actual monopolization cases, it warned that "one must be particularly wary of the numbers game of market percentages when considering an 'attempt to monopolize' suit." *Id.* at 207 n.2.

a broader approach was adopted in *Becker v. Safelite Glass Corp.*,¹⁴⁴ in which the court required proof of the plaintiff-competitor's market share, the portion or percentage of his business affected by the defendant's conduct, the defendant's existing market share and the potential addition to it from the conduct in question, the general state of the market, and general indicia of monopoly power.¹⁴⁵

The dangerous probability requirement has been criticized on the ground that it permits a competitor with little market power or one not on the verge of attaining monopoly power to engage in predatory or exclusionary practices without fear of liability under the attempt prohibition.¹⁴⁶ Although many of these practices may be unlawful under other antitrust provisions, some will escape because of statutory requirements like the conspiracy element of section 1 of the Sherman Act. Thus, a lacuna is created through which undesirable conduct escapes all or many of the provisions of the antitrust laws. For this reason some commentators have urged the abolition of the dangerous probability requirement.¹⁴⁷

¹⁴⁴ 244 F. Supp. 625 (D. Kan. 1965). The defendant was relatively small compared with "the four giants of the auto glass industry." *Id.* at 638.

¹⁴⁵ *Id.* at 638-40. The court concluded that it was "inconceivable . . . that defendants could actually monopolize the area." *Id.* at 638; see *B & B Oil & Chem. Co. v. Franklin Oil Corp.*, 293 F. Supp. 1313, 1319 (E.D. Mich. 1968).

A different approach to dangerous probability was taken in *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 579 (7th Cir. 1972), cert. denied, 405 U.S. 1066 (1972), in which the circuit court appears to have lumped together specific intent and dangerous probability under the latter heading. The court held that a dangerous probability existed where the plaintiff: (1) had the capacity to commit the offense as shown by its share of the market (33%) and its significant and profitable patent position; (2) intended to acquire the power to exclude competition from a substantial share of the market as shown by its attempt to reissue broad claim patents and its acquisition of another dominating patent; and (3) used "predatory" conduct to accomplish that purpose. *Id.* at 598-99.

¹⁴⁶ See Note, *supra* note 6, 1969 UTAH L. REV. at 709-11.

¹⁴⁷ *Id.* Only the Ninth circuit, in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964), has specifically rejected this requirement. Its two-fold rationale, however, is not persuasive for several reasons. First, the circuit court reasoned that specific intent is the only evidence of dangerous probability needed, "perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." 327 F.2d at 474. But this assumption is totally unreasonable. Specific intent or "illegal objective" is invariably inferred from conduct, not from a subjective intent to monopolize existing in the defendant's mind. Even when there is evidence of a subjective unlawful intent, the court's assumption does not follow because it rests on the dubious premise that an intention or a motive existing in the mind of the actor causes his conduct. Cf. G. RYLE, *THE CONCEPT OF MIND* 86-89 (1949).

Second, the circuit court relied (327 F.2d at 474) on precedent which does not support elimination of the dangerous probability requirement, since the cases cited dealt with different factual situations. Two of the cases were "mixed" cases (*Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and *Independent Iron Works, Inc. v. United States Steel*

The most persuasive argument for eliminating the dangerous probability requirement is the lacuna problem, especially in light of the policy underlying the attempt provision—to stop monopolization in its incipency.¹⁴⁸ Professor Turner argues that specific intent alone is sufficient evidence of an unlawful attempt because conduct accompanied by specific intent lacks, by definition, economic or social justification. He cites “predatory price-cutting” and “coercive refusals to sell” as examples.¹⁴⁹ If conduct establishing specific intent is always without eco-

Corp., 322 F.2d 656 (9th Cir.), cert. denied, 375 U.S. 922 (1963)), and the third was *Griffith*, the two-market leverage case. See notes 25-35 and accompanying text *supra*.

Moreover, the Ninth Circuit itself appears to have retreated recently from *Lessig* by limiting it to attempt claims based upon “substantial claim[s] of restraint of trade” under § 1. See *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972). The highly ambiguous nature of the dangerous probability requirement was further aggravated by the court’s cryptic language in *Moore v. J.H. Matthews Co.*, 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 74,263, at 93,256 (9th Cir. Nov. 29, 1972) (citation omitted):

Finally, this court has ruled that an attempt to monopolize under section 2 does not require proof of monopoly power. Proof that there is a “dangerous probability of success” is certainly enough. . . . Evidence of market power is relevant, but not indispensable to a *Lessig* claim.

Only two district courts outside the Ninth Circuit appear to have rejected the dangerous probability requirement. See *Rea v. Ford Motor Co.*, 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 74,332 (W.D. Pa. Dec. 28, 1972); *McCormack v. Theodore Hamm Brewing Co.*, 284 F. Supp. 158 (D. Minn. 1968). See also *Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080 (D. Md. 1969).

The most convincing criticism of *Lessig*’s reliance on precedent can be found in *Becker v. Safelite Glass Corp.*, 244 F. Supp. 625, 637-38 (D. Kan. 1965). See generally *Diamond Int’l Corp. v. Walterhoefer*, 289 F. Supp. 550 (D. Md. 1968). In *United States v. Charles Pfizer & Co.*, 245 F. Supp. 737, 739 (E.D.N.Y. 1965), the court distinguished between conspiracy to monopolize (no market necessary) and attempt (market necessary): “The gravamen of conspiracy is an agreement to commit an illegal act; the gravamen of attempt is the specific intent to commit an illegal act, but falling short of completion.” *Id.* See also *Smith, supra* note 6, at 240-41.

¹⁴⁸ Prior to *Lessig*, one district court flirted with this argument but felt constrained by the Supreme Court’s holdings in *Griffith* and *Alcoa*. See *Campbell Distrib. Co. v. Joseph Schlitz Brewing Co.*, 208 F. Supp. 523 (D. Md. 1962). In *Campbell*, the court recognized “some persuasiveness” in the plaintiff’s argument that dangerous probability should not be required because the purpose of § 2 mandated that “the beginnings of illegal conduct should be condemned as much as the illegal end result. . . . [A] monopolist must begin somewhere; his illegal ultimate objective should be nipped in the bud.” *Id.* at 529.

It has been convincingly argued that the criminal law’s concept of attempt, upon which the dangerous probability requirement was based in *Swift*, is inapplicable to § 2. See Note, *supra* note 6, 1969 UTAH L. REV. at 710-712. The following reasons have been offered to support the argument: (1) Congress, in enacting the Sherman Act, relied on pre-1890 tort and contract law with little reference to criminal law; (2) the existence of criminal penalties under § 2 is not a persuasive justification; § 2 is more accurately a charter to be flexibly construed than a penal statute; and (3) other criminal law terms in the Sherman Act, such as “conspiracy,” are not limited to criminal law definitions. *Id.*

¹⁴⁹ Turner, *supra* note 6, at 305. Professor Turner also relies on language in *Columbia*

conomic or social justification, the incipency argument is very persuasive, and the only obstacle to its acceptance is the Supreme Court's dicta in *Swift*.¹⁵⁰ The weakness of this argument lies in the fact that it is not always clear what constitutes "predatory price" cutting. Furthermore, "without economic justification" is more conclusory than descriptive. Thus, the fundamental problem presented by attempt claims is still unresolved—what criteria are relevant in determining which competitive practices are "predatory," "unfair," "exclusionary," or "without economic justification." Professor Turner has recognized this problem with respect to actual monopolization; terming conduct "illegal" solves nothing because the conduct in question is

both potentially restrictive and potentially beneficial. . . . It is necessary to examine the economic context in which the conduct takes place to determine whether the restrictive effects outweigh the benefits. And typically the restrictive effects will vary directly with the market power of the firm involved.¹⁵¹

The same uncertainty exists when an attempt to monopolize is alleged because the conduct under inquiry is the same. Professor Turner distinguishes actual monopolization from attempt on the ground that in "the typical attempt or conspiracy case . . . one may readily infer that the principal goal is aggrandizement unmerited by superiority in product or technique."¹⁵² This description is inaccurate. Often an inference of aggrandizement cannot "readily" be made. Moreover, uncertainties arise from the imprecise goals of the antitrust laws, particularly the problem that competition can result in harm to competitors both in the long and short run. This fundamental ambiguity increases the difficulty of determining when conduct has social or economic justification or when conduct is predatory.¹⁵³

The dangerous probability requirement should be retained for three reasons. First, the anticompetitive effects of restrictive business practices increase with market power.¹⁵⁴ Therefore, the degree of the defendant's market power is directly relevant to any evaluation of its conduct. The dangerous probability requirement is the vehicle by which

Steel to justify eliminating the dangerous probability requirement. *Id.* at 294. This reliance, however, is misplaced. See Smith, *supra* note 6, at 235-37.

¹⁵⁰ See notes 19-23 and accompanying text *supra*.

¹⁵¹ Turner, *supra* note 6, at 314.

¹⁵² *Id.* at 306.

¹⁵³ Cf. J. BAIN, *INDUSTRIAL ORGANIZATION* 357-65, 462-63, (2d ed. 1968).

¹⁵⁴ See Turner, *supra* note 6, at 314.

market power and structural considerations enter the evaluation of conduct in an attempt claim. Dangerous probability thus complements the finding of objective specific intent. Second, the requirement serves as an additional deterrent to hasty condemnations of conduct and practices of uncertain competitive merit or harm. Such condemnation could easily occur in the context of determining specific intent, a determination fraught with vague and ill-defined criteria. Third, the significance of the lacuna defect has been exaggerated. Expansion of the definition of the "agreement" required for section 1 has significantly narrowed the lacuna.¹⁵⁵ While this expansion is open to criticism as unwarranted and troublesome, the imprecision of the attempt offense does not constitute a more workable solution.

The broader approach to the dangerous probability requirement exemplified in *Cliff Food Stores, Inc. v. Kroger, Inc.*¹⁵⁶ and *Becker v. Safelite Glass Corp.*¹⁵⁷ is preferable to an exclusive reliance on the defendant's market share percentages.¹⁵⁸ This broader approach results in a more accurate determination of the defendant's ability to achieve monopoly power through the conduct in question than reliance upon a figure of market percentage. And if, as Bain suggests, there is an identifiable historical evolution toward concentration in an oligopolistic market,¹⁵⁹ the stage of evolution of the entire industry involved would be relevant to any determination of dangerous probability.

The dangerous probability doctrine has not been utilized in two-market "misuse of monopoly power" situations. Neither *Griffith* nor *Otter Tail* appears to require a dangerous probability of success in the nonmonopoly market, and lower courts have not imposed a dangerous probability requirement in *Griffith* situations.¹⁶⁰ The absence of this requirement is justified on the grounds that the defendant already enjoys a monopoly in one market and that it is the leverage power itself which is allegedly the underlying evil in this situation.

¹⁵⁵ See, e.g., *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

¹⁵⁶ 417 F.2d 203 (5th Cir. 1969).

¹⁵⁷ 244 F. Supp. 625 (D. Kan. 1965).

¹⁵⁸ See notes 144-45 and accompanying text *supra*.

¹⁵⁹ J. BAIN, *supra* note 153, at 159-62.

¹⁶⁰ See, e.g., *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*, 360 F.2d 79 (6th Cir. 1966), *cert. denied*, 393 U.S. 844 (1968); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1962); *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945); *cf. Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 691 (8th Cir. 1966).

III

DISPOSITION OF ATTEMPT CLAIMS INVOLVING RECURRING
FACT SITUATIONS

There is a surprising consistency in the actual disposition by courts of attempt claims despite the varying rationales and definitions utilized. Although unanimity does not reign, certain fact situations have often engendered the same results regardless of the rationale of the court.

At the outset, a distinction between one-market and two-market cases should be employed. In the former, the defendant's conduct occurs in a single product and geographic market *and* on a single level of the manufacturing-distribution chain except for mere sales to or purchases from another level. In a two-market case, the defendant's conduct occurs either in more than one product or geographic market *or* on more than one level of the distribution chain. Thus, conduct of a fully integrated producer-seller almost invariably gives rise to a two-market situation.¹⁶¹

A. *Two-Market Situations*

An unlawful attempt to monopolize has been found more frequently in two-market situations than in one-market cases. In many of the two-market cases, the attempt claim was combined with an allegation of actual monopolization, and courts occasionally have found a violation of section 2 generally without specifying a particular provision.¹⁶² Further refinement of the two-market situation into *Griffith* and non-*Griffith* cases is useful. A *Griffith* two-market situation exists when the defendant has monopoly power in one of the markets or on one level of the distribution chain. A violation of section 2 occurs when this monopoly power is misused in a second market, usually to gain a competitive advantage through the leverage resulting from its dominance in the primary monopoly market. A non-*Griffith* situation exists when a defendant operates in two markets or on two levels of the distribution chain but does not have monopoly power in any market or on any level.

1. *Griffith Situations*

While the lower courts often have expressed indecision on whether an attempt to monopolize or actual monopolization is the proper of-

¹⁶¹ Tying arrangements have been treated by the courts as one-market situations, and are so classified here, although they involve conduct occurring in more than one product market.

¹⁶² See, e.g., *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967).

fense,¹⁶³ *Griffith* situations have almost invariably been examined under criteria different from those applied to attempt claims generally.¹⁶⁴ This special treatment is likely to continue in the wake of *Otter Tail*. The typical *Griffith* attempt to monopolize case involves integrated producers with a monopoly on one level of production who engage in supply squeezes, price squeezes, boycotts, and other conduct directly harmful to competitors in one of the nonmonopoly markets.¹⁶⁵ The courts have displayed little hesitancy in finding an unlawful attempt or a sufficient attempt allegation under the *Griffith* misuse of monopoly power rationale. Meaningful recourse is rarely made to the *Swift* formulation or to other familiar approaches to attempt to monopolize claims.¹⁶⁶

¹⁶³ See, e.g., *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*, 360 F.2d 79 (6th Cir. 1966), *cert. denied*, 393 U.S. 814 (1968); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1962); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958).

¹⁶⁴ The presence of actual monopolization combined with the allegation of leverage power distinguishes *Griffith* situations from one-market cases and, to a lesser extent, from non-*Griffith* two-market cases.

¹⁶⁵ See, e.g., *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967); *North Texas Producer's Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966); *Union Carbide & Carbon Co. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1962); *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945).

¹⁶⁶ An example of a *Griffith* situation is *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,813 (S.D. Tex. 1971), in which a monopolist in one product market expanded into a related product market by launching a below-cost operation in the second market. The defendants had 85% of the insurance credit reporting market, 26% of the nonlocal credit reporting market, and a "dominant position" in certain cities. *Id.* at 91,441. The court found actual monopolization of the principal market and an attempt to monopolize the subsidiary market. *Id.* Specific intent was based primarily upon the defendants' launching of a below-cost operation in the subsidiary market when they knew it could not make a profit. The court viewed the expansion as a *Griffith* misuse of monopoly power situation. The dangerous probability requirement was not even mentioned in connection with the subsidiary market.

In *Jerrold*, the district court applied the conventional attempt formulation and held that forward vertical integration by a monopolist does not constitute an attempt to monopolize. *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). But in a subsequent private treble damage action, the Ninth Circuit held that Jerrold had used its dominant position in the manufacturing market to attempt to monopolize the local CATV market in the Northwest. The court also found unlawful concerted boycotts and tying arrangements as well as a conspiracy to monopolize. *Jerrold Electronics Corp. v. Westcoast Broadcasting Co.*, 341 F.2d 653 (9th Cir.), *cert. denied*, 382 U.S. 817 (1965).

However, in *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963), the circuit court affirmed a directed verdict for the defendant, an integrated steel producer-fabricator who had "rationed" orders to the plaintiff-fabricator. The court reasoned that a sudden and unexpected steel shortage occurring during a sudden increase in demand constituted a legitimate business purpose

According to traditional antitrust theory, anticompetitive dangers in a *Griffith* situation arise primarily from the leverage existing in a monopoly market and used to gain an advantage in a second market or distribution level.¹⁶⁷ As monopoly power magnifies the anticompetitive effects of restrictive business conduct or increases the potential for abuse, a holder of such power operating in a second market or on a different level of the distribution chain should be subject to a stricter standard than that applied to a nonmonopolist operating either in one or in several markets. This higher standard is embodied in the *Griffith* test of misuse of monopoly power.

The restrictiveness of the *Griffith* test makes it preferable to any of the conventional formulations of attempt offenses, such as specific intent and dangerous probability. Moreover, treatment of *Griffith* situations as a separate problem serves the welcome purpose of focusing attention on the controversial concept of "leverage" upon which the courts base their severe attitudes toward *Griffith* situations.¹⁶⁸ Recognition of the *Griffith* misuse of monopoly power standard as a unique offense under section 2¹⁶⁹ would serve the dual purpose of eliminating much of the confusion surrounding judicial treatment of attempts to

behind the rationing. *Id.* at 661. The court also noted that orders to *all* fabricators, including the defendant's own fabricating plants, were rationed. *Id.* at 663. It is unclear from the opinion whether the defendant had monopoly power in the steel production market. If not, this case does not represent a *Griffith* situation.

¹⁶⁷ See, e.g., *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *United States v. Griffith*, 334 U.S. 100 (1948); E. SINGER, *ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC MODELS 190-95* (1968).

The *Griffith* two-market situation may also give rise to assertedly anticompetitive cross-subsidization, that is, the use of monopoly profits gained in the principal market to subsidize operations in the subsidiary market. See, e.g., A. BURNS, *THE DECLINE OF COMPETITION 450-53* (1936); A. KAPLAN, *BIG ENTERPRISE IN A COMPETITIVE SYSTEM 215* (1954).

This ill-defined concept of leverage has been employed by the courts, particularly in the areas of tying arrangements (see, e.g., *United States v. International Salt Co.*, 332 U.S. 392 (1947)), and vertical integration. See, e.g., *United States v. Paramount Pictures*, 334 U.S. 131 (1948). As to the asserted anticompetitive effects of vertical integration, see J. BAIN, *supra* note 153, at 360-62; C. KAYSER & D. TURNER, *supra* note 130, at 122; E. SINGER, *supra* at 206-23.

¹⁶⁸ The traditional antitrust view of leverage has been sorely criticized with respect to tying arrangements. See, e.g., Markovits, *Tie-ins, Leverage, and the American Antitrust Laws*, 80 *YALE L.J.* 195 (1970). See also Bowman, *Tying Arrangements and the Leverage Problem*, 67 *YALE L.J.* 19 (1957). For a criticism of leverage with respect to vertical integration, see Bork, *Vertical Integration and the Sherman Act*, 22 *U. CHI. L. REV.* 157 (1954).

¹⁶⁹ Recently, one district court expressly recognized the distinction proposed herein between *Griffith* situations and other attempt situations in which the specific intent plus dangerous probability standard applies. See *GAF Corp. v. Circle Floor Co.*, 329 F. Supp. 823, 829 n.7 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 752 (2d Cir. 1972).

monopolize as well as facilitating needed analysis and criticism of the offense.¹⁷⁰

Judicial willingness to find antitrust violations in *Griffith* cases (whether or not a separate offense rationale is used) reduces the lacuna problem in two ways. First, an integrated producer with a monopoly on one level of the distribution chain can be held to violate section 2 even when he unilaterally practices price or supply squeezes which would constitute offenses under section 1 except for the absence of a conspiracy. Second, *Griffith* can be used to reach unilateral refusals to deal by one holding monopoly power.¹⁷¹

2. Non-Griffith Situations

In non-*Griffith* two-market situations¹⁷²—operation by a non-monopolist in two markets or on two distribution or manufacturing levels—the courts have largely continued to use the traditional formulation of the attempt offense—specific intent plus dangerous probability in the second or subsidiary market. In employing this standard the courts have found fewer attempts to monopolize than in *Griffith* cases.

Expansion by acquisition alone, either horizontal or vertical, has never been condemned as an attempt.¹⁷³ Offers to buy out an only competitor have also been held not to constitute an attempt to monopolize.¹⁷⁴ Yet an attempt to monopolize was found when a horizontal

¹⁷⁰ Further analysis and criticism of the *Griffith* rationale constitutes a subject requiring extensive comment beyond the scope of the present Article.

¹⁷¹ Resort to *Griffith* may not be necessary, however, because *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), prohibits unilateral refusals to deal in order "to create or maintain a monopoly." See also *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). Dangerous probability is not required under either rationale. Both tests do require some "bad" intent or purpose to monopolize. The analysis under the *Colgate* exception is substantially the same as the analysis under "specific intent" of attempt to monopolize. See *Otter Tail Power Co. v. United States*, 93 S. Ct. 1022 (1973); *Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966).

¹⁷² Absence of monopoly power is the only difference between *Griffith* and non-*Griffith* two-market situations. Since measurement of monopoly power is not exact, it is not always certain whether a particular case involves a *Griffith* situation or not. In those areas of doubt, stricter standards, in proportion to the degree of market share involved, might be applied to the conduct under consideration. Thus, a sliding scale test would be employed in non-*Griffith* two-market situations. Any imprecision in such a scale would be justified because of the larger anticompetitive risks arising from misuse of monopoly power to gain an advantage in a second market.

¹⁷³ See *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948); *Bender v. Hearst Corp.*, 152 F. Supp. 569 (D. Conn. 1957), *aff'd on other grounds*, 263 F.2d 360 (2d Cir. 1959).

¹⁷⁴ *Scott Publ. Co. v. Columbia Basin Publ., Inc.*, 293 F.2d 15 (9th Cir.), *cert. denied*, 368 U.S. 940 (1961); *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F.

acquisition was followed by predatory conduct against a competitor and there was no arguable economic justification for such conduct.¹⁷⁵ A vertical acquisition by dairy producers having fifty-five to sixty percent of the raw milk market was also held to constitute an attempt when it was followed by price squeezes, geographic price discrimination, boycotts, other "deceptive" practices in the wholesale milk processing market, and acquisition of the chief competing processor.¹⁷⁶

The mere entrance into a second market or distribution level by internal expansion does not constitute an attempt to monopolize the second market. This result has been reached in cases involving geographic market expansion¹⁷⁷ and vertical integration.¹⁷⁸ As in acquisition

Supp. 125 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

¹⁷⁵ *Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080 (D. Md. 1969). The predatory conduct alleged included physical harassment and removal of essential business files. Although the court at one point apparently rejected dangerous probability as a requirement, the requirement was undoubtedly met anyway by the approximately 68% market share resulting from the merger. *Id.* at 1091. *But see* *Sam S. Goldstein Indus., Inc. v. Botany Indus., Inc.*, 301 F. Supp. 728 (S.D.N.Y. 1969). In *Goldstein*, a horizontal acquisition was followed by alleged price discrimination and groundless threats of trademark enforcement suits. However, the defendants' market share was not alleged and the court dismissed the attempt count, although it granted leave to amend the complaint.

¹⁷⁶ *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966). Both the district court and the circuit court, however, viewed the case as a *Griffith* situation because of the defendants' dominant position in the primary market of raw milk. The district court stated: "As a processor . . . [the defendants] could use the economic power gained from this monopolistic position in raw milk to cut the price of processed milk and to destroy profits on the sale of processed milk by any competing processor." 241 F. Supp. at 480. The circuit court noted that the defendants' "dominant position in raw milk production was necessarily an element of influence in anything [they] might choose to do" and that this position "demanded caution on [the defendants'] . . . part when [they] embarked on processing." 368 F.2d at 691.

¹⁷⁷ *Central Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 422 F.2d 504 (8th Cir. 1970); *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

¹⁷⁸ *Hiland Dairy, Inc. v. Kroger Co.*, 274 F. Supp. 966 (E.D. Mo. 1967), *aff'd*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969). In *Hiland Dairy*, a retail chain with 8% of the retail milk market integrated backwards by building a milk processing plant with a capacity ultimately to produce 20% of the milk processing market. Plaintiff, a competing milk processor, alleged the construction of the plant and a subjective specific intent to monopolize as evidence of the attempt to monopolize the subsidiary market of milk processing. The district court found that neither specific intent nor dangerous probability was sufficiently alleged and dismissed the complaint for failure to state a claim. 274 F. Supp. at 968-69. The circuit court refused to consider the case as a *Griffith* two-market leverage situation. 402 F.2d at 975-76. It held that Kroger's 8% share in the retail milk market was insufficient market power to create a dangerous probability of monopolization of the processing market. *Id.* at 975. Conversely, the court noted there was no dangerous probability of an attempt to monopolize the retail market by using milk as a loss leader in the retail outlets because Kroger had insufficient power in the retail

cases, however, anticompetitive conduct following internal expansion by a nonmonopolist may constitute an attempt to monopolize the second market. For example, a jury verdict against the defendant was upheld when forward vertical integration by a car manufacturer was followed by allegedly below-cost pricing and deceptive advertising practices at the dealer level.¹⁷⁹

The question arises whether the dangerous probability requirement should be eliminated in the non-*Griffith* as well as the *Griffith* situation. In both the crucial factor is whether sufficient leverage power exists in the principal market to create the potential for anticompetitive effects in the subsidiary market. A stricter attempt standard should be imposed, however, only when this leverage danger is substantial. This danger is certainly present in *Griffith* situations, but its existence is not so clear in non-*Griffith* situations where power in the principal market is weaker. Consequently, a dangerous probability of monopolization of the subsidiary market resulting from expansion and post-expansion conduct should be a necessary element in a non-*Griffith* two-market attempt situation. This conclusion is reinforced when it is considered that the attempt standards should not be so strict that entry of new competition into subsidiary markets is inhibited or prevented.¹⁸⁰

market to recoup losses from ruinous wholesale milk prices. *Id.* The circuit court also noted the absence of any allegedly anticompetitive or unlawful conduct beyond the expansion itself and stated that internal expansion is favored under the antitrust laws over expansion by acquisition or joint venture. Indeed, internal expansion was said often to be desirable since it brings a new competitor into the market. *Id.* at 975-76. The circuit court further stated that the antitrust laws are designed to protect competition and not competitors: "Plaintiffs' market shares are not protected by the anti-trust laws and they have no legal basis for precluding competition of Kroger in their [processing] field." *Id.* at 977. See generally *Central Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 422 F.2d 504 (8th Cir. 1970).

¹⁷⁹ *Mount Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969). The district court noted (283 F. Supp. at 458) that Chrysler's forward integration resembled somewhat the "sheet squeeze" unlawfully employed in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). The below-cost pricing was described as "predatory price-cutting." 283 F. Supp. at 459.

In *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970), a full-time manufacturer of auto sealants terminated its distributorship in one geographic area and began direct retail sales in the same area. Following the termination, the defendant engaged in allegedly "predatory" tactics against its former distributor, e.g., lower prices to customers and hiring away of the distributor's top salesman who in turn took with him the most important customers. *Id.* at 1337-38. In reversing a summary judgment for the defendant, the circuit court noted that the defendant allegedly had a monopoly or at least a dominant position in the manufacturing market. *Id.* at 1341-42. Thus, the case might be viewed as a *Griffith* situation.

¹⁸⁰ The attempt to monopolize provision may, however, also provide broader antitrust liability when practices held to be "reasonable" restraints under § 1 are nevertheless

Dual distribution can be treated for attempt purposes as a two-market situation.¹⁸¹ Either the non-*Griffith* or *Griffith* two-market test can be applied to dual distribution cases depending upon the market power in the primary market.¹⁸² Dual distribution attempt claims have infrequently appeared in the reported decisions.¹⁸³

B. One-Market Cases

In most one-market cases the attempt to monopolize allegation was treated as a tag-along to the plaintiff's principal claims of restraint of trade or violation of section 3 of the Clayton Act. The most recurrent examples have been cases involving termination of a distributorship where an attempt to monopolize is appended to the allegation of an unlawful refusal to deal.¹⁸⁴ The claim of an unlawful attempt in these cases has rarely affected the plaintiff's recovery. Thus, when no other antitrust violations are found, the courts have held no unlawful attempt, treating the latter issue in a rather summary fashion.¹⁸⁵ And even when other violations are found or are held to be sufficiently alleged, many courts have still refused to find an unlawful attempt due

found to constitute an unlawful attempt. See, e.g., *Mount Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969). Ordinarily, however, evidence establishing "reasonableness" also establishes an absence of specific intent to monopolize. See, e.g., *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948).

¹⁸¹ For a recent treatment of dual distribution, see Comment, *Dual Distribution and Attempted Monopolization under Section 2 of the Sherman Act*, 11 DUQUESNE L. REV. 68 (1972).

¹⁸² See *Hearings on the Impact upon Small Business of Dual Distribution and Related Vertical Integration Before Subcomm. 4 of the House Select Comm. on Small Business*, 88th Cong., 1st Sess. 1591 (1963) (letter from the Justice Department):

Dual distribution can, however, become an antitrust problem. Ordinarily this occurs in the context of a market in which integrated firms hold substantial market power. Such power may be exercised in a particular market by the firm's occupancy of a dominant market position or by the conglomerate power which goes with its overall size. If market power is not present dual distribution is not ordinarily a problem cognizable under the antitrust laws.

¹⁸³ In one decision the court refused to find an attempt when a manufacturer-supplier, in response to an express request by a customer to bid below a competing purchaser-supplier, submitted a bid which was below the cost of the supplier. Despite the similarity to a price squeeze, the court expressly refused to infer specific intent, probably because the defendant's bid was in response to the customer's demand for a lower bid. See *Gold Fuel Serv., Inc. v. Esso Standard Oil Co.*, 306 F.2d 61 (3d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

¹⁸⁴ See, e.g., *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963), *cert. denied*, 385 U.S. 976 (1966); notes 187-90 *infra*.

¹⁸⁵ See, e.g., *Daily Press, Inc. v. United Press Int'l*, 412 F.2d 126 (6th Cir. 1969); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959); *Holly Springs Funeral Home, Inc. v. United Funeral Serv., Inc.*, 303 F. Supp. 128 (N.D. Miss. 1969).

to an absence of conclusive proof of specific intent or dangerous probability.¹⁸⁶

Refusal to deal cases aptly illustrate these generalizations. The courts are virtually unanimous in holding that a refusal to deal, or a termination and substitution of a distributor, by itself does not constitute an unlawful attempt to monopolize.¹⁸⁷ Some courts have reasoned that specific intent cannot be inferred from the refusal, usually because an acceptable business reason or justification has been shown.¹⁸⁸ Lack of dangerous probability is often cited in other decisions, usually because the cut-off dealer or distributor had a minute share of the market.¹⁸⁹ When one small distributor has simply been replaced by another, the typical judicial reaction to an attempt claim approaches incredulity.¹⁹⁰ This attitude is ordinarily justified, for it is difficult to see how the probability of monopolization increases simply from a substitution of one distributor by another. Such an increase might arguably occur where a more pliant distributor is named, but this involves the imposition of, or agreement upon, an unlawful practice prohibited under section 1 of the Sherman Act or section 3 of the Clayton Act.

Attempt claims are often alleged to avoid the agreement strictures of section 1 of the Sherman Act. The Ninth Circuit has tried to overcome this conspiracy obstacle without resort to the attempt theory.¹⁹¹

¹⁸⁶ See, e.g., *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963), *cert denied*, 385 U.S. 976 (1966); *Brewer Sewing Supplies Co. v. Fritz Gegauf, Ltd.*, 1970 Trade Cas. ¶ 73,139 (N.D. Ill.).

¹⁸⁷ E.g., *Daily Press, Inc. v. United Press Int'l*, 412 F.2d 126 (6th Cir. 1969); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963), *cert. denied*, 385 U.S. 976 (1966); *Kirihara v. Bendix Corp.*, 306 F. Supp. 72 (D. Hawaii 1969). *But see* *Alles Corp. v. Senco Prods., Inc.*, 329 F.2d 567 (6th Cir. 1964) (dismissal reversed of complaint alleging that defendant had 50% of market and had actually monopolized as well as attempted to monopolize).

¹⁸⁸ See, e.g., *N.W. Controls, Inc. v. Outboard Marine Corp.*, 333 F. Supp. 493 (D. Del. 1971). For one court's analysis of a business justification, see *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954) (plaintiff unable to effectively represent defendant's products).

¹⁸⁹ See, e.g., *L.S. Good & Co. v. H. Daroff & Sons.*, 263 F. Supp. 635 (N.D.W. Va. 1967). The court stated that the defendant had only a small share of the market and it was "hardly conceivable that [the defendant's] refusal to sell in this case could constitute an attempt to monopolize." *Id.* at 647.

¹⁹⁰ For example, a cut-off gas station dealer asserted that his substitution and termination was an attempt to monopolize. After noting that there were at least 18 other Texaco dealers and at least 200 dealers of other gasolines in the area, the court declared that it was "sheer nonsense to say that defendant terminated the lease . . . in an endeavor to eliminate competition and to gain a monopoly on the service stations in said trade area." *Alexander v. Texas Co.*, 149 F. Supp. 37, 44 (W.D. La. 1957).

¹⁹¹ In *Alpha Distrib. Co. v. Jack Daniels Distillery*, 454 F.2d 442 (9th Cir. 1972), the court stated:

Although the Ninth Circuit's approach also contains terms like "intent" and "motive," it does delineate in greater detail the proof requirements for a finding of unlawfulness. It is also preferable to the conventional attempt standards because it does not carry with it the mixed and confusing baggage of attempt precedent accumulated over the years. In sum, conduct consisting *solely* of allegedly unlawful refusals to deal in a one-market situation should not be treated as an attempt to monopolize—a conclusion consistent with case law.¹⁹²

The courts have not been consistent in their treatment of attempt claims when the allegedly unlawful conduct consists solely of boycotts, tie-ins, or exclusive dealing arrangements. Again an attempt claim rarely adds to the plaintiff's recovery because most courts have either refused to find an attempt or have done so only after violations of sections 1 and 3 were already established.¹⁹³

Failure to prove dangerous probability is the chief obstacle to branding unlawful boycotts (even per se violations of section 1) as attempts to monopolize,¹⁹⁴ because specific intent can be readily inferred from such conduct.¹⁹⁵ Cases in which concerted refusals to deal comprise the only allegedly unlawful conduct should be examined exclusively under the standards and precedent developed under section 1. The attempt rationale is superfluous and can only further confuse an already complex area of the law.

The same general observations apply to tying and exclusive dealing arrangements alleged to be unlawful attempts as well as violations

The critical inquiry in such "refusal to deal" cases is not whether there was a refusal to deal, or whether a refusal to deal was carried out by agreement with others, but rather whether the refusal to deal, manifested by a combination or conspiracy, is so anticompetitive, in purpose or effect, or both, as to be an unreasonable restraint of trade. . . . This inquiry is primarily a factual one, and its resolution often requires determination of motive or intent.

Id. at 452.

¹⁹² For an excellent proposed approach to the problem of distributorship terminations, see Buxbaum, *Boycotts and Restrictive Marketing Arrangements*, 64 MICH. L. REV. 671 (1966). Professor Buxbaum argues that the present attempt rationale obfuscates the critical issues involved. *Id.* at 686.

¹⁹³ See, e.g., *Christiansen Co. v. Mechanical Contractors Bid Depository*, 230 F. Supp. 186 (D. Utah 1964), *aff'd*, 352 F.2d 817 (10th Cir.), *cert. denied*, 384 U.S. 918 (1965) (boycotts also unlawful as conspiracy to monopolize and attempt). See generally cases cited in note 194 *infra*.

¹⁹⁴ *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963), *cert. denied*, 385 U.S. 976 (1966); *Evening News Publ. Co. v. Allied Newspaper Carriers*, 160 F. Supp. 568 (D.N.J. 1958), *aff'd*, 263 F.2d 715 (3d Cir.), *cert. denied*, 360 U.S. 929 (1959).

¹⁹⁵ See, e.g., *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125, 141 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961) (group boycott by one of two competitors in narrow market found conclusive evidence of exclusionary intent and attempt to monopolize).

of section 1 of the Sherman Act or section 3 of the Clayton Act.¹⁹⁶ The courts have consistently viewed the attempt claim as a mere tag-along.¹⁹⁷ Many courts consider section 3 of the Clayton Act narrower in coverage than section 2 of the Sherman Act and have concluded that an arrangement which does not violate section 3 cannot constitute an attempt to monopolize.¹⁹⁸ Other courts have refused to find an attempt because of failure to prove dangerous probability or a relevant market,¹⁹⁹ or because a finding of "reasonableness" under section 3 negated specific intent.²⁰⁰ As with boycotts, conduct consisting solely of tying or exclusive dealing arrangements should not be considered attempts to monopolize, and the standards developed under sections 1 and 3 should be used exclusively.

Few decisions have been reported where pricing practices alone have constituted the allegedly unlawful conduct. When the practices have been combined with other conduct, special attention has been devoted to them.²⁰¹

The courts are hesitant to find an attempt to monopolize when below-cost pricing is alleged.²⁰² Although it is often stated that below-

¹⁹⁶ Many tying and exclusive dealing cases arise after a refusal to deal. Therefore, there is some overlap among the decisions.

¹⁹⁷ This is perhaps best exemplified by *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961), in which the court found that certain tying arrangements violated § 1 and § 3 but held that they did not constitute unlawful attempts because of the defendants' "good faith" in maintaining them. 187 F. Supp. at 568.

¹⁹⁸ In *Campbell Distrib. Co. v. Joseph Schlitz Brewing Co.*, 208 F. Supp. 523 (D. Md. 1962), the court opined that § 2's requirement may be more stringent than § 3's standard—"substantially lessen competition or tend to create a monopoly." *Id.* at 530. Thus, conduct not violative of § 3 could not be held to violate § 2. *Id.* This rationale was also expressed in *Cayne Equip. Corp. v. Union Asbestos & Rubber Co.*, 1963 Trade Cas. ¶ 70,879 (S.D.N.Y.); "[T]he essence of illegality in tying arrangements is the wielding of economic leverage to restrain a not insubstantial volume of commerce in the tied products. A violation of Section 2 surely requires a showing of at least as much." *Id.* at 78,542; see *Curley's Dairy, Inc. v. Dairy Coop. Ass'n*, 1962 Trade Cas. ¶ 70,200 (D. Ore. (requirements contracts lawful under § 3 cannot violate § 2)).

¹⁹⁹ See, e.g., *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959) (exclusive dealing arrangements); *Advance Bus. Sys. & Supply Co. v. SCM Corp.*, 287 F. Supp. 143 (D. Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (tie-ins unlawful under § 1); *United States v. Charles Pfizer & Co.*, 245 F. Supp. 737 (E.D.N.Y. 1965) (exclusive dealing arrangements).

²⁰⁰ See *Bank of Utah v. Commercial Security Bank*, 369 F.2d 19 (10th Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967).

²⁰¹ See notes 203-10 and accompanying text *infra*.

²⁰² A single price reduction was held lawful under § 1 and § 2 when it was long in contemplation, bore a realistic relation to competitors' price changes, and corresponded to costs of production and the defendants' decline in sales. See *Balian Ice Cream Co. v. Arden Farms Co.*, 1952 Trade Cas. ¶ 67,266 (S.D. Cal.), *aff'd*, 231 F.2d 356 (9th Cir. 1955).

cost pricing is predatory and raises an inference of specific intent,²⁰³ the attempt claim rarely has been successful for a number of reasons: (1) the prices were neither below cost nor "excessively"²⁰⁴ or "unreasonably" low;²⁰⁵ (2) the practices were defensive and thus justified;²⁰⁶ and (3) dangerous probability was not demonstrated.²⁰⁷ In *Union Leader*,²⁰⁸ for example, rate reductions were held not to constitute an unlawful attempt unless the reductions resulted in unreasonably large losses in the long run; otherwise, the requisite intent to inflict injury on a competitor could not properly be inferred.²⁰⁹

Reluctance to declare price reductions and below-cost pricing attempts to monopolize is justified on three grounds: (1) price competition is a highly desirable goal, therefore low prices should not normally be discouraged; (2) predatory pricing may be a form of nonmaximizing or irrational behavior which rarely occurs and may lack significant anticompetitive effects even when it does;²¹⁰ and (3) it is difficult to determine the existence and effect of such pricing in a given market.²¹¹

²⁰³ See, e.g., *Ovitron Corp. v. General Motors Corp.*, 295 F. Supp. 373 (S.D.N.Y. 1969) (condemning below-cost pricing as often predatory, unfair, and exclusionary).

²⁰⁴ See *John Wright & Associates v. Ullrich*, 203 F. Supp. 744 (D. Minn. 1962), *aff'd*, 328 F.2d 474 (8th Cir. 1964). Although the district court also found questionable nonpricing conduct present in the hiring away of the plaintiff's manager and newspaper libel of the plaintiff instigated by the defendant (203 F. Supp. at 747-48), the circuit court analyzed the case solely in terms of the bidding practices.

²⁰⁵ See *Scott Publ. Co. v. Columbia Basin Publ., Inc.*, 293 F.2d 15, 22 (9th Cir. 1961).

²⁰⁶ E.g., *John Wright & Associates v. Ullrich*, 328 F.2d 474 (8th Cir. 1964); *Scott Publ. Co. v. Columbia Basin Publ., Inc.*, 293 F.2d 15 (9th Cir. 1961); *N.W. Controls, Inc. v. Outboard Marine Corp.*, 333 F. Supp. 493 (D. Del. 1971); *cf. Gold Fuel Serv., Inc. v. Esso Standard Oil Co.*, 306 F.2d 61 (3d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

²⁰⁷ *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969); *Allen Ready Mix Concrete Co. v. John A. Denie's Sons*, 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,955 (W.D. Tenn. 1972).

²⁰⁸ 180 F. Supp. 125 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

²⁰⁹ 284 F.2d at 590. One circuit court has held that evidence of "predatory and discriminatory" geographic below-cost pricing was sufficient to go to the jury as a conspiracy to monopolize and as a concerted attempt to monopolize, but the ultimate outcome of the claim was unclear and was apparently unfavorable to the plaintiff. See *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 389 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963). A jury verdict for the plaintiffs was reversed and the case was remanded for a new trial because of erroneous instructions. On retrial, the jury on special interrogations found a violation only of § 2(a) of the Robinson-Patman discrimination amendments. See *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 223 F. Supp. 712 (E.D. Tenn. 1963), *aff'd*, 346 F.2d 661 (6th Cir. 1965).

²¹⁰ 284 F.2d at 590.

²¹¹ See, e.g., Dewey, *Competitive Policy and National Goals: The Doubtful Relevance of Antitrust*, in A. PHILLIPS, PERSPECTIVES ON ANTITRUST POLICY 78-81 (1965); Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971).

Finally, conduct consisting solely of an alleged tort under state law has been alleged in many cases. This has generally been held not to constitute an attempt to monopolize.²¹²

C. "Bundle" Cases

A large number of reported decisions deal with conduct consisting of a "bundle" of practices which together are alleged to constitute an unlawful attempt to monopolize.²¹³ As in single practice cases, dangerous probability has been the principal impediment to recovery when the defendant's share in the relevant market has not been alleged or proved. Attempt claims have been dismissed on this ground even though the alleged conduct and practices consisted of per se restraints of trade, violations of section 3 of the Clayton Act, and common law torts.²¹⁴ If dangerous probability is proved,²¹⁵ or is not required,²¹⁶

See generally, Yamey, Predatory Price Cutting: Notes and Comments, 15 J. LAW & ECON. 129 (1972).

One court has noted: "[P]rice cutting, as distinguished from price discrimination, is a competitive practice not prohibited by the antitrust laws in the absence of special circumstances" *Bond Distrib. Co. v. Carling Brewing Co.*, 32 F.R.D. 409, 413 (D. Md. 1963).

²¹² In *Keco Indus., Inc. v. Borg-Warner Corp.*, 5 TRADE REG. REP. (1972 Trade Cas.) ¶ 73,808 (M.D. Pa. Dec. 17, 1972), summary judgment on claims of actual and attempted monopolization was granted to the defendants when trade disparagement was the sole conduct alleged. *Cf. Syracuse Broadcasting Corp. v. Newhouse*, 236 F.2d 522 (2d Cir. 1956). *But see Smith-Victor Corp. v. Sylvania Elec. Prods., Inc.*, 242 F. Supp. 302 (N.D. Ill. 1965). In *Smith-Victor*, the plaintiff alleged that the defendant had expended huge advertising sums to disparage the plaintiff and to misrepresent the defendant's product. The defendant was also alleged to have temporarily reduced prices "to clog the channels of distribution ahead of normal peak sales." *Id.* at 313. In denying summary judgment for the defendant, the court expressed serious doubts as to the validity of the attempt theory but felt bound by the liberal federal pleading rules. After noting that "discovery in anti-trust cases can be very expensive" (*id.* at 314), the court limited discovery to determining "whether the defendant controls a share of the relevant market which *could* give rise to a conclusion that it has the power to monopolize that market." *Id.* (emphasis added).

In *Bernard Food Indus., Inc. v. Dietene Co.*, 415 F.2d 1279 (7th Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970), the district court held that the defendant's intentional and deliberate libel of the plaintiff's product and misrepresentation as to its own product constituted trade libel, a violation of the Lanham Trade-Mark Act (§ 43(a), 15 U.S.C. § 1125(a) (1970), and an unlawful attempt to monopolize. The circuit court reversed on all grounds, holding that, with respect to the attempt claim, there was no evidence of specific intent or proof of the relevant market. 415 F.2d at 1284. The circuit court also held that the state tort claim was barred by the statute of limitations and that the Lanham Act was not applicable under the facts. *Id.* at 1281-84.

²¹³ *See notes 214-18 infra.*

²¹⁴ The most blatant example is *Mackey v. Sears, Roebuck & Co.*, 237 F.2d 869 (7th Cir. 1956), *cert. denied per stipulation*, 355 U.S. 865 (1957), in which the court dismissed the complaint for failure to state a claim under either § 1 (unilateral conduct only) or § 2, holding that neither specific intent nor dangerous probability had been sufficiently alleged. The court did, however, characterize the following conduct as "reprehensible"

the courts have been more disposed to find an unlawful attempt in bundle cases than in single conduct cases.²¹⁷

The distinction between bundle and single conduct cases is lessened when each aspect of the defendant's conduct is considered separately and specific intent is inferred from a single practice.²¹⁸ Since the gestalt approach focuses more on the defendant's conduct as a whole rather than on an evaluation of each individual practice, a bundle allegation appears more likely to be upheld if the gestalt approach is used. This combination of bundle claims and gestalt jury instructions has given rise to criticism of alleged misuse of the attempt theory.²¹⁹

and "predatory": localized below-cost price cutting, threats of refusals to deal to induce breach of contract, misrepresentations and trade libel, and palming-off. *Id.* at 873-74. Similarly, in *Brewer Sewing Supplies Co. v. Fritz Gegauf, Ltd.*, 1970 Trade Cas. ¶ 73,139 (N.D. Ill.), the court dismissed the attempt count for lack of specific intent and relevant market allegations. The conduct consisted of alleged refusals to deal, price-fixing, territorial market division, and misappropriation of trade secrets. *See also* *Becker v. Safelite Glass Corp.*, 244 F. Supp. 625 (D. Kan. 1965) (summary judgment based on failure to allege defendant's market power despite alleged exclusive dealing arrangements, price discrimination, and unlawful promotional allowances).

²¹⁵ In *Clausen & Sons v. Theodore Hamm Brewing Co.*, 284 F. Supp. 148 (D. Minn. 1967), *rev'd*, 395 F.2d 388 (8th Cir. 1968), summary judgment for the defendant was denied in the face of an allegation that the defendant had 35% to 50% of the relevant market and had imposed resale price maintenance, exclusive dealing and tying contracts, territorial restrictions, price discrimination, and discriminatory credit terms.

In natural monopoly situations, dangerous probability is not material and a mere bundle of allegedly unlawful practices will probably be held to constitute an attempt. *See, e.g.*, *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961) (boycotts, solicitations of customers by advertisers who failed to disclose principal, and secret discriminatory advertising rates).

If a defendant has sufficient market power to constitute a monopoly, dangerous probability is an actuality. For example, in *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir. 1957), liability was imposed upon the defendant newspaper publisher which had 95% of the St. Louis market and had threatened to refuse to take ads and to cancel desirable space, entered into tie-ins with its radio station, tied together sales of its two daily newspapers, imposed unit advertising, and purchased the assets of a competitor indispensable to a new entrant.

²¹⁶ *See* *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 933 (1964).

²¹⁷ In *Big Value Stamp Co. v. Sperry & Hutchinson Co.*, 1967 Trade Cas. ¶ 71,978 (S.D. Ohio), summary judgment for the defendant was denied because specific intent could be inferred from the following practices: false advertising, attempts by the defendant to control the terms and conditions upon which suppliers sold to the defendant and its competitors, and interference by the defendant with the valuations which the plaintiff placed upon the merchandise in its catalog.

²¹⁸ *See* *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

²¹⁹ *See* *Hibner*, *supra* note 6, at 173-77.

D. Patent and Trademark Cases

Certain practices involving patents and trademarks have been brought within the attempt offense prohibition. A typical example is the allegation that patent cross-licensing and pooling agreements constitute patent misuse and violations of the antitrust laws.²²⁰ The courts do not use the conventional attempt formulation and often fail even to cite attempt precedent. They appear to view these patent and trademark cases as *sui generis*, arising under section 2 of the Sherman Act, without any analysis or discussion of which particular provision of section 2 is applicable.²²¹

In some of these cases the attempt claim was unnecessary because the defendant enjoyed monopoly power in the relevant market and actual monopolization provided a sufficient basis for imposing liability.²²² Even when the defendant had not yet attained monopoly power in the relevant market, unlawful attempts have been found without any resort to the dangerous probability requirement.²²³

When the conduct involves cross-licensing and pooling agreements, the test is usually stated in terms of an unlawful intent or purpose to monopolize or to unlawfully use the patents.²²⁴ A more specific test is applied when infringement suits or threats of litigation are involved. If such suits are brought in bad faith and not in an honest belief of infringement, an unlawful attempt to monopolize is found.²²⁵ Again, no dangerous probability requirement is imposed.²²⁶

²²⁰ See, e.g., *Switzer Bros. v. Locklin*, 297 F.2d 39 (7th Cir. 1961), cert. denied, 369 U.S. 851 (1962); *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938); *Clapper v. Original Tractor Cab Co.*, 165 F. Supp. 565 (S.D. Ind. 1958), aff'd in part, 270 F.2d 616 (7th Cir. 1959).

²²¹ For example, in *Switzer Bros. v. Locklin*, 297 F.2d 39 (7th Cir. 1961), cert. denied, 369 U.S. 851 (1962), the court held that patent pyramiding, exclusive dealing and tying arrangements, and institution of frivolous trademark and patent infringement suits violated § 1 and § 2 of the Sherman Act. The court briefly discussed the conduct as an attempt to monopolize but concluded by combining "attempt" with "tending to create a monopoly." *Id.* at 42.

²²² See *Clapper v. Original Tractor Cab Co.*, 165 F. Supp. 565, 577 (S.D. Ind. 1958), aff'd in part, 270 F.2d 616 (7th Cir. 1959) ("dominant position" and "virtual control" of defendant). Some courts do not define the market beyond the patent itself. See *Switzer Bros. v. Locklin*, 297 F.2d 39 (7th Cir. 1961), cert. denied, 369 U.S. 851 (1962).

²²³ See *Lynch v. Magnovox*, 94 F.2d 883, 890 (9th Cir. 1938) (defendants had no "substantial dominance or exclusion" in radio loud-speaker market).

²²⁴ *Clapper v. Original Tractor Cab Co.*, 165 F. Supp. 565, 576-77 (S.D. Ind. 1958), aff'd in part, 270 F.2d 616 (7th Cir. 1959); see *Lynch v. Magnovox*, 94 F.2d 883, 887 (9th Cir. 1938).

²²⁵ E.g., *La Salle Street Press, Inc. v. McCormick & Henderson, Inc.*, 445 F.2d 84 (7th Cir. 1971); *Kellogg Co. v. National Biscuit Co.*, 71 F.2d 662 (2d Cir. 1934); *American TCF Corp. v. Shell Oil Co.*, 127 F. Supp. 208 (S.D.N.Y. 1955). But see *International Visible Sys. Corp. v. Remington-Rand, Inc.*, 65 F.2d 540 (6th Cir. 1933).

Because the conventional attempt precedent is not relied upon, these patent cases are totally different from the ordinary attempt cases. The elimination of the dangerous probability requirement results in a far more prohibitive standard, which is justified to some extent by the monopoly power inherent in patents. Furthermore, the typical patent case involves the use (or abuse) of the patent as leverage to obtain a competitive advantage similar to the leverage power condemned in *Griffith*. However, the patent or trademark may be examined in the context of a broader relevant market in which the offending patentee or licensee does not enjoy substantial or even significant market power. A court which emphasizes proof of a relevant market over the uniqueness of the patent may be more likely to require that conventional attempt tests be met than to consider the patent-trademark case unique and the dangerous probability standard inapplicable.²²⁷

CONCLUSION

Although attempt claims have infrequently increased a party's relief or recovery, the attempt offense remains an important though ill-defined enforcement weapon. Recovery may be triggered by a jury acting under broad instructions. Thus, the claim can be a misfiring blunderbuss which has lain hidden in the thicket of protracted anti-trust litigation. This unpredictability is caused in part by the specific intent requirement which obscures the gravamen of the attempt offense—an evaluation of business conduct in light of the structural char-

²²⁶ *But see* *Agrashell, Inc. v. Hammons Prods. Co.* (8th Cir. March 30, 1973), noted in 609 ATRR A-15 (April 17, 1973) (definition of market necessary).

²²⁷ *See* *Diamond Int'l Corp. v. Walterhoefer*, 289 F. Supp. 550 (D. Md. 1968). In *Diamond*, the defendant counterclaimed that the plaintiff had monopolized and attempted to monopolize by committing fraud on the Patent Office and by instituting four infringement suits. Treating the case as a conventional attempt situation, the court held that dangerous probability was required but was not proved in view of the decline in the plaintiff's market share over an eight-year period. The allegations concerning the four infringement suits were apparently disregarded or given scant attention by the court.

Diamond is analogous to *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); both belong to a particular category of cases involving frauds against the Patent Office. Separation of *Walker*-type cases from the general group of patent-trademark cases is necessary because the Supreme Court did not make it clear in *Walker* whether actual monopolization or attempt to monopolize, or both, was the relevant offense. Lower courts also appear to treat *Walker* situations as *sui generis*, an undifferentiated § 2 offense. *But see* *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 579 (7th Cir. 1971). In *Kearney & Trecker*, the court applied the dangerous probability requirement and held that an attempt to monopolize occurred when the plaintiff procured a reissue of a patent upon hiring a retiring Patent Office examiner involved in the issuance of the original patent. The court analogized the case to the *Walker* situation. *Id.* at 599.

acteristics of the industry. Specific intent is also the vehicle by which courts have resolved attempt claims without articulating the criteria underlying the evaluation of conduct.²²⁸ Moreover, the elusive concept of *subjective* intent has clouded the analysis. For these reasons, reconsideration of the specific intent requirement is imperative.

Any reformulation of the attempt offense should be consistent with the theory underlying the completed offense of actual monopolization. Since monopoly power alone is insufficient to constitute actual monopolization,²²⁹ the attempt offense should not prohibit an attempt merely to attain monopoly power. The essential inquiry in both actual monopolization and attempts to monopolize is an evaluation of conduct. With monopolization, this evaluation is directed toward a finding of behavior which, when combined with the structural requirement of monopoly power, constitutes the offense. In attempt claims, the dangerous probability requirement supplies the structural considerations.

This comparison of the attempt offense with actual monopolization compels the conclusion that antitrust's ghost in the machine²³⁰—

²²⁸ Failure to articulate the criteria underlying the evaluation of conduct raises serious questions as to the sufficiency of the rationale for many decisions involving attempt to monopolize claims. The bases for decisions should be specifically delineated in order to provide guidance to the practicing attorney and to the bench in future controversies. Articulated rules and principles serve the important function of placing limits on judicial discretion and decision making. For a discussion of the relationship between principled decision making and judicial discretion, see R. WASSERTROM, *THE JUDICIAL DECISION* (1961); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

²²⁹ Some undesirable conduct is necessary to differentiate the offense of actual monopolization from the bare existence of monopoly power. This conduct or "plus" factor has been described as consisting of restraints of trade or exclusionary practices. See, e.g., *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953).

The "plus" factor or undesirable conduct element has been enunciated in a negative fashion—monopolization is absent when monopoly power results solely from superior skill, superior products, natural advantages (including accessibility to raw materials or markets), economic or technological efficiency (including scientific research), low margins of profit permanently maintained without discrimination, or licenses conferred by law. *Id.* The Supreme Court has recently defined the offense of monopolization as: (1) monopoly power and "(2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

²³⁰ The phrase "ghost in the machine" is borrowed from Ryle, *The Concept of Mind*. Ryle refers to the Cartesian dichotomy of "mind" and "body" as "the dogma of the Ghost in the Machine" (*id.* at 15-16) and rejects the notion of volition as operations of the mind by which it gets its ideas translated into action:

It [the rejected notion of volition] is just an inevitable extension of the myth of the ghost in the machine. . . . [T]o say that a person pulled the trigger intentionally is to express at least a conjunctive proposition, asserting the occurrence of one act on the physical stage and another on the mental stage; and, according to most versions of the myth, it is to express a causal proposition, asserting that the bodily

subjective specific intent—should be laid to rest. Subjective specific intent is defined here as an intention existing in the mind of the actor. A subjective intent to acquire monopoly power or to monopolize is irrelevant if monopoly power alone continues not to constitute the completed offense of actual monopolization. Furthermore, a subjective intent to monopolize is superfluous when an intent to monopolize is alleged. An actor cannot be said to intend to monopolize if the objective of his intention—monopolization—exists only *after* a judicial evaluation that certain conduct is undesirable (“plus” conduct). Thus, even subjective intention to monopolize cannot be found to exist prior to an evaluation of conduct.

Nevertheless, evidence of business purpose is not irrelevant. Purpose is relevant as evidence of the business and economic circumstances in which the conduct is evaluated. Indeed, the great majority of so-called subjective evidence in attempt cases has consisted of business reasons or asserted economic justifications and not of declarations of intent to achieve a monopoly or drive a competitor out of business.²³¹

A more radical proposal is to replace the specific intent requirement with a verbal formulation which does not denote or connote “intention,” thus eliminating many of the unwanted side effects. Intention does not play the same role in the attempt to monopolize offense as it does in the ordinary criminal attempt, as evidenced by the relationships to the completed offenses. The conduct constituting the offense of arson, for example, has been clearly defined and ordinarily little or no evaluation of that conduct by the court is necessary or proper.²³² Similarly, an alleged attempt to commit arson requires no

act of pulling the trigger was the effect of a mental act of willing to pull the trigger.

Id. at 63.

²³¹ A subjective intention to destroy a competitor should be treated like a subjective intention to monopolize. In both instances, the crucial issue is the manner (*i.e.*, the *conduct*) in which the competition is destroyed—*how* the monopoly is acquired—and not the intent with which the acts are committed.

The argument that the subjective intention of the actor has some relevance, at least when the conduct lies in a twilight zone between tolerated behavior and that behavior deemed undesirable, is of dubious merit in light of the almost exclusive reliance upon a behavioral-structural approach to attempts to monopolize. Any relevance of a subjective intention to monopolize or to drive a competitor out of business is minimal and outweighed by the inevitable obfuscation of the primary focus of inquiry—the evaluation of conduct.

²³² See, *e.g.*, N.Y. PENAL CODE §§ 150.00-20 (McKinney 1967). The extent of judicial evaluation of the conduct said to comprise the completed offense varies with the precision and detail of the legislative definition. While some statutory construction may occur in the more usual criminal offenses such as arson, it is significantly and radically more limited than the evaluation compelled by § 2's totally undefined reference to “monopolize, or

evaluation of conduct beyond a determination that overt acts have occurred in some temporal proximity to the completed offense. The defendant's intention is relevant only to the nearness and possibility of completion. On the other hand, the conduct constituting the completed offense of actual monopolization is not well-defined and, indeed, monopolization cannot be determined until after a judicial evaluation of that conduct in a particular case. The same evaluation must be made with respect to alleged attempts to monopolize. The defendant's subjective intent is irrelevant to both evaluations, and specific intent should be banished to the Valhalla of legal fictions that create more confusion than clarity.²³³ In fact, the place of intent in the criminal law itself is under increasing challenge;²³⁴ thus, the wisdom of its continued acceptance as part of the formulation of the attempt to monopolize offense is weakened further.²³⁵

Reformulation of the specific intent requirement would serve to concentrate attention on the criteria used in the evaluation of conduct. The economic and political criteria now employed are frequently im-

attempt to monopolize . . . any part of . . . trade or commerce." 15 U.S.C. § 2 (1970). Thus, the distinction between § 2 offenses and other criminal law definitions remains valid and important.

²³³ In this sense, both the general intent required for actual monopolization and the specific intent required for attempts to monopolize are fictions. General intent is often defined as intending the foreseeable consequences of one's action. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945).

²³⁴ Use of the term "intent" in criminal law has received much criticism and careful analysis in recent years. For example, H.L.A. Hart has argued that characterization of an act as "intentional" arises only with respect to excluding certain excusing conditions such as mistake and accident. Hart, *The Ascription of Responsibility and Rights*, reprinted in A. FLEW, *LOGIC AND LANGUAGE*, FIRST SERIES 145 (1952). The Model Penal Code omits the term "intent" from its definition of an attempt. See MODEL PENAL CODE § 5.01 (Proposed Official Draft, 1962).

Moreover, the doctrine of *mens rea* does not prevent imposition of criminal sanctions for an attempt to monopolize. First, the *mens rea* requirement rests on the principle that only voluntary actions should be punished; claims of attempt to monopolize are based on voluntary conduct and are "intentional" in the *mens rea* sense. Second, the concept of absolute criminal liability could be employed. Intent, particularly general intent, is a fiction introduced as an element of § 2 offenses, perhaps to salve the jurisprudential consciences of those clinging to the principle that some intent or *mens rea* is necessary before criminal sanctions can be imposed. However, absolute liability is not an unknown doctrine in Anglo-American criminal law and no jurisprudential obstacles exist to the elimination of general and specific intent as elements of Sherman Act offenses. Cf. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 31-32, 132 (1968). But cf. Thalberg, *Hart on Strict Liability and Excusing Conditions*, 81 ETHICS 150 (1971) (distinction between strict liability offenses and those in which courts investigate states of mind exaggerated).

²³⁵ For a discussion of intention, see G. ANSCOMBE, *INTENTION passim* (1957); A. GOLDMAN, *A THEORY OF HUMAN ACTION* 49-85 (1970). For a criticism of the philosophical literature and a defense of the place of intention in criminal law, see G. WILLIAMS, *THE MENTAL ELEMENT IN CRIME passim* (1965).

precise and often inconsistent as applied to particular fact situations. The difficulty of the evaluation is compounded when amorphous and subjective judicial notions of ethical criteria are employed, as for example, standards of unfairness which rest ultimately on an undisclosed business morality.

A clear, precise, and well-detailed formulation of the attempt offense must overcome two obstacles. First, any final formulation must await identification and perhaps reconciliation of the policies and criteria underlying section 2 of the Sherman Act.²³⁶ Second, the philosophies ultimately found to underlie the evaluation of a monopolist's conduct may be incapable of reconciliation. Thus, the articulation of sufficiently detailed and clear instructions to the jury will be difficult. Nevertheless, it is essential that the jury's decision take place in a context free from such misleading linguistic conundrums as the specific intent formulation.

In the interim, the standards used to evaluate the "plus" conduct in actual monopolization cases should replace specific intent instructions to the jury in attempt cases.²³⁷ This replacement has the double advantage of eliminating the unwanted side effects associated with specific intent and of reconciling the attempt offense with the completed offense of actual monopolization.

The dangerous probability requirement should be retained since it complements the behavioral element of the offense as the vehicle by which the defendant's market power and other structural factors are evaluated.²³⁸ The dangerous probability requirement also serves as an additional protection from hasty condemnations of those business practices demonstrating ambivalent competitive merit or harm.

Finally, *Griffith* two-market situations should continue to be ex-

²³⁶ It is arguable whether this has been sufficiently accomplished for actual monopolization in view of the breadth and vagueness of terms like "business acumen" and "historical accident." See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

²³⁷ It must be conceded, unfortunately, that jury instructions in actual monopolization cases are often inconsistent or unclear and do not always reflect the division of the actual monopolization offense into neat compartments of monopoly power and "plus" conduct as proposed herein. See, e.g., ABA, *ANTITRUST CIVIL JURY INSTRUCTIONS* 97-103 (1972).

²³⁸ Professor Mason has criticized the proposition that intent can be inferred solely from conduct on the ground that important structural factors (notably a defendant's market power) are omitted. See Mason, *Preface* to C. KAYSEN & D. TURNER, *supra* note 130, at xiii-xv. The dangerous probability requirement supplies these structural factors so that both conduct and structure are considered when an attempt to monopolize is alleged. Moreover, introduction of structural criteria through the separate dangerous probability requirement has the additional advantage of minimizing confusion between the conduct and structure elements. See *id.* at xv.

amined separately without resort to either the traditional *Swift* test and its variants or the proposed replacement.

In view of the somewhat anarchic state of the law of attempts to monopolize, perhaps the Supreme Court will, at the first appropriate opportunity, address itself to the attempt offense and its underlying criteria and policies. Only then can the attempt provision of section 2 become a more predictable enforcement weapon.